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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

vs.

HARDY M. SNOW, JR. and
ACCREDITED SURETY & CASUALTY COMPANY, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether international agreements between the United States and Canada and overriding federal interests in international comity require the Florida courts to enforce Petitioner's valid Canadian judgment against the Florida defendants who were responsible for the kidnapping of Petitioner's husband by bounty hunters in Canada.

2. Whether Petitioner was deprived of her due process rights under the Fourteenth Amendment when the Florida courts refused to enforce a valid Canadian judgment because it considered Petitioner's claims to be derivative of her husband's claims and her husband's claims to be barred for policy reasons.

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No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

Ruth Jaffe petitions the Court for a writ of certiorari to review the judgment of the District Court of Appeal of the State of Florida, Fifth District in this case.

OPINIONS BELOW

The opinion of the Fifth District Court of Appeal of the State of Florida is reported at 610 So. 2d 482, and is set out in Appendix A, pp. A1-A16. The order of the Court of Appeal denying rehearing has not yet been reported, and is set out at Appendix B, p. A17. The order of the Supreme Court of Florida declining jurisdiction has not yet been reported, and is

set out in Appendix C, p. A18. The opinion of the Ninth Judicial Circuit, in and for Orange County, Florida, granting summary judgment to Respondents is set out in Appendix D, pp. A19-A28. The judgment of the Ontario Court (General Division) is set out in Appendix E, pp. A29-A31.

JURISDICTION

The order of the Supreme Court of the State of Florida denying Petitioner's petition for review was entered on May 10, 1993. The jurisdiction of this court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supremacy Clause in Article VI of the United States Constitution:

> [2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

> supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Relevant passages from the Treaty on Extradition Between the United States of America and Canada (27 U.S.T. 983 (1976)) are set out in Appendix I. The Protocol Amending the Treaty on Extradition (27 I.L.M. 422 (1988)) is set out in Appendix H. The Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States Concerning the Protocol (27 I.L.M. 422 (1988)) is set out in Appendix G.

STATEMENT

Petitioner, Ruth Jaffe, filed a petition in 1990 in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida to recognize and enforce a money judgment which she obtained in the Canadian courts against Accredited Surety & Casualty Company, Inc., a Florida company, and its president, Hardy Snow, a Florida citizen, for injuries she suffered as a result of the kidnapping of her husband, Sidney Jaffe, in Canada by bounty hunters sent into Canada by Respondents.

The Circuit Court granted summary judgment in favor of Snow and Accredited. (App. D). The Circuit Court found that it would be against Florida's public policy to allow Petitioner to collect her valid Canadian judgment because her claims were "derivative" of her husband's and Mr. Jaffe could not collect such a judgment in Florida because it would enable him to profit from his own "wrong." (App. D, p. A25). The Circuit Court also found that there were no treaties or statutes, state or federal, that required Florida to recognize Petitioner's judgment and that such recognition was a matter of "mere courtesy and good will," citing *Hilton v. Guyot*, 159 U.S. 113 (1895). (App. D, p. A22).

Petitioner appealed from the judgment. The Fifth District Court of Appeals affirmed the Circuit Court's judgment on November 13, 1992. (App. A, pp. A1-A16). A rehearing was denied on January 12, 1993. (App. B, p. A17). Petitioner filed a timely motion to invoke the jurisdiction of the Supreme Court of Florida, which was denied on May 10, 1993. (App. C, p. A18).

This case has its origins in claims by the Florida state authorities that Petitioner's husband, Sidney Jaffe, engaged in unlawful land sale practices. Mr. Jaffe was arrested in Florida in August 1980 on such charges. He obtained bail from Respondent Accredited Surety & Casualty Company ("Accredited") and was released from custody. He then returned to his home in Toronto, Canada. Petitioner and Mr. Jaffe are Canadian citizens.[1]

On the scheduled day of his trial, Mr. Jaffe's Florida attorneys appeared on his behalf and informed the court that Mr. Jaffe could not attend for medical reasons and sought a continuance. Instead, the request for a continuance was denied and an arrest warrant issued. The judge also ordered that the bond be forfeited and directed the state attorney to commence extradition proceedings to procure Mr. Jaffe's return from Canada. The state attorney submitted two applications for extradition to the Governor of Florida, both of which were disapproved by the Florida Attorney General.

Not content to let the forfeiture and extradition proceedings run their course,[2] respondent Snow, the President

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[1] The Florida courts have erroneously considered Mr. Jaffe to be a U.S. citizen (App. B, p.A-20).

[2]While the Appellate Court is correct that Unlawful Land Sales Practices are not among the extraditable offenses listed in the treaty between the United States and Canada, fraud is an extraditable offense under the treaty, and the state of Florida was trying to prove that Mr. Jaffe defrauded purchasers in property deals. Treaty on Extradition, Dec. 3, 1971, United States-Canada, 27 U.S.T. 983,

of Accredited, and Accredited, decided to obtain Jaffe by extralegal means. Despite the fact that transborder "bounty hunting" is illegal in the United States and Canada, Snow and Accredited hired two bounty hunters and sent them to Canada to abduct Mr. Jaffe and bring him to Florida. On September 21, 1981, while jogging near his home in Canada, Mr. Jaffe was forcibly abducted, illegally confined, and driven to the United States-Canada border where the bench warrant was used to secure his entrance into this country. He was then flown to Florida for detention and trial.[3]

The Government of Canada filed formal protests with the Government of the United States objecting to the abduction and demanding that Mr. Jaffe be released. The United States Department of Justice and the United States Department of State condemned Mr. Jaffe's abduction from Canada as a violation of United States public policy.

The United States Secretary of State George Shultz recognized "the gravity of the incident" in the following words:

> it is perfectly understandable that the Government of Canada is outraged by [Mr. Jaffe's] alleged kidnapping, which Canada considers a violation of the treaty and of

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997-998, T.I.A.S. 8237. The Appellate court was therefore in error when it relied on the finding in *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987) that Canada would not have been obligated to surrender Mr. Jaffe on those charges, even if a formal extradition treaty had been made by the governor of Florida. Two requests for the extradition of Mr. Jaffe were denied by the Governor for improper form, not because extradition would be inappropriate under the treaty.

[3]As stated in the Canada *Amicus Curiae* brief, transborder bounty hunting has been condemned by the international community. It is the criminal offense of kidnapping in Canada, the United States and Florida; kidnapping is an extraditable offense in both countries. (App. F, p.A37).

> international law, as well as an affront to its sovereignty.

Canada Amicus Curiae brief filed in *Jaffe v. Snow*, 610 So. 2d 482 ("Canada brief") (App.F, pp.A36-A37).

Secretary Shultz further recognized the serious effect of the kidnapping on Canada-United States relations, and he stated United States public policy when he said:

> It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most important and highly valued neighbors.

Id. (App. F, pp. A37-A38).

In 1982 the bounty hunters hired by Accredited and Snow were indicted by the Government of Canada for kidnapping. Extradition was requested by Canada, initiated by the United States Government, and granted by the United States Magistrate.[4] The bounty hunters appealed. In 1983 the bounty hunters were ordered extradited to Canada.

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[4]Explicitly defining the United States policy on transborder abductions from Canada by bounty hunters, is the letter dated January 11, 1988, from Secretary of State Shultz to Canada's Minister of External Affairs Joe Clark. Furthermore, the United States reiterated that it would cooperate to discourage and deter any further bounty hunter excursions into Canada. A copy of the exchange of letters, which was attached to the Amicus Brief of the Government of Canada (App. F), is contained in App. I.

On September 3, 1983, Mr. Jaffe's convictions on the unlawful land sale practices charges were reversed, but his conviction on the charge of failure to appear was affirmed.[5]

In 1983, Mr Jaffe was charged with organized fraud.[6] At Mr. Jaffe's bond hearing on September 30, 1983, the Canadian Government, the United States Department of State and the United States Department of Justice all appeared to explain their interest in the case.[7]

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[5]The decision overturning the convictions concluded: "because we decide this case on the basis of the failure of the charging document to state a criminal cause of action under this statute and because we conclude that even if the charging document accurately tracked the statute the proof at trial would not sustain those allegations, we do not reach the constitutional question presented and this opinion should not be construed to even impliedly uphold the constitutionality of this statute as against the claim that it is too vague and ambiguous to reasonably apprise a person of the conduct he must avoid in order to keep from being guilty of a felony crime." *Jaffe v. State of Florida*, 438 So. 2d 72, 74 (Fla. 5th Dist. Ct. App. 1983)("Jaffe I"). Surprisingly, despite this strong language, the trial court found and the appellate court quoted the finding that, "the unlawful land sales practices were not 'unfounded.' [T]he reversals were not based upon insufficient evidence but rather upon the legal insufficiency of the charging document." (App. A, p. A5). (The case referred to as Jaffe II is reported at 463 So.2d 318 (Fla. 5th Dist. Ct. App. 1984), and mischaracterizes the holding in Jaffe I).

[6]Although it is conceded that this charge is an extraditable offense under the Extradition Treaty between the United States and Canada, Florida has never sought the extradition of Mr. Jaffe on this charge.

[7]The United States Department of State explained the federal interest in the case as follows: "In sum, Your honor, I simply want to point out that among the totality of circumstances that you will wish to take into consideration as deciding the proper sum would be for bail, one such consideration I submit is that, in arriving at the reasonable figure for bail, you should take into consideration that the

On October 11, 1983, Mr. Jaffe was released. Upon release, Mr. Jaffe immediately returned to his home in Canada.

In 1985, Petitioner brought suit in the Supreme Court of Ontario, Canada, against Snow and Accredited and other defendants, seeking money damages for the damages she suffered as a result of Mr. Jaffe's illegal abduction. Snow and Accredited, represented by Canadian counsel, filed their appearance in the Canadian action.

In 1986, the two men who physically kidnapped Mr. Jaffe were tried and convicted in the Canadian courts.[8]

On November 22, 1990, the Ontario court entered judgment in favor of Petitioner and against Accredited and Snow in the amount of $177,752.30 Canadian dollars and $1,401,570.80 United States dollars. Only $25,000 Canadian dollars of the entire judgment was for general damages. The judgment was based on extensive documentation that Petitioner filed to support her special damage claims. The special

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continued incarceration of Mr Jaffe will have the deleterious effects upon our relationship with Canada that I just outlined." Transcript of bond hearing proceedings on September 30, 1983 at 44, *State of Florida v. Jaffe*, Case No. 83-638-CF-J (Fla. 7th Cir. Ct. 1983). Canada emphasized its concerns about the rule of law: "Under international law, Canada is entitled to Mr. Jaffe's return and regards these proceedings as contrary to its rights of superior custody of Mr. Jaffe. Canada submits that given the specific circumstances of this case, Mr. Jaffe's immediate release and return to Canada would be in accordance with international law and the law of the United States." *Id.* at 41. Since Canada believed that under international law it had superior custody it argued that Florida should seek extradition of Mr. Jaffe on the organized fraud charges. To date, no such action has been made to extradite Mr. Jaffe from Canada to the United States. That the Florida courts have refused enforcement of the judgment on the basis of these facts alone raises comity and federal public policy questions.

[8]*Johnson v. Kear*, Ont. H.C. June 9, 1986, *affirmed*, 5 C.C.C. (3d) 574 (Ont. C.A. 1989).

damages award reflected the Petitioner's expenses she incurred as a result of her husband's illegal abduction. Mrs Jaffe's expenses totaled $903,481.47 United States dollars and $88,293.56 Canadian dollars. Mrs Jaffe was also awarded pre-judgment interest on all sums. (App. E, pp. A30, A31). The special damages were not a punitive award.

Petitioner then brought the action below seeking to enforce her Canadian judgment in Florida. On July 26, 1991, the trial court entered its order granting judgment in favor of Snow and Accredited. (App. D, pp. A19-A28). The court recognized the Ontario judgment as valid and rejected all of Snow and Accredited's procedural and technical defenses. However, the court held that it was not compelled to recognize the judgment, and refused to do so on public policy grounds.

Petitioner then appealed that ruling to the Fifth District Court of Appeal. The Fifth District Court of Appeal affirmed. The Appellate court adopted the view that the "recognition and enforcement of a foreign country's judgment in Florida is a matter of 'comity,' and it is up to the courts of this state to make the particular determination in each particular case." (App. A.p.A8). The court further held that "no jurisdiction will give comity to the judgment of another nation that offends the jurisdiction's public policy and sense of moral justice." (App. A, p.A9). The court recognized that Florida recognizes and enforces the judgments of other nations in the overwhelming number of cases, and that this is particularly true of countries like Canada which have a system of jurisprudence which has developed from the same roots as our own. However, the opinion states:

> In this case, had Sidney Jaffe sought to enforce a Canadian judgment against his surety in this state, there are many public policy reasons why a Florida court would refuse to recognize and enforce it, which go far beyond the fact that the law of Canada (bounty hunters cannot single-handedly arrest and return a bond-

> jumper to the court which accepted the bond) is different than Florida's law. (App. A, p. A9).

There was no discussion of federal law concerning the illegality of bounty hunting -- which is an extraditable offense under the Extradition Treaty between the United States and Canada -- or of any of the federal interests in this case. Instead, the Florida court did find that Sidney Jaffe was a fugitive from justice. The Appellate court noted that Florida courts had an established public policy that the Florida court will "not permit or tolerate a person to benefit from his own wrongful act." (App. A, p. A14).

The Appellate court also found that the Petitioner's claims were derivative, since the court reasoned the Petitioner's cause of action was necessarily born out of Sidney Jaffe's tort suit for wrongful kidnapping. Broadly construing the fugitive from justice doctrine, the court held:

> The fugitive from justice doctrine would bar any of Jaffe's claims for damages from his return to Florida by his bondsmen. Mrs Jaffe's claims are derivative of her husband's and likewise are barred under the fugitive from justice doctrine.

(App. A, p. A16).

The Appellate court denied Mrs. Jaffe's motion for rehearing, and the Supreme Court of Florida denied her petition for a hearing.

REASON FOR GRANTING THE PETITION

I. THE FLORIDA JUDGMENT BELOW CONFLICTS WITH INTERNATIONAL AGREEMENTS BETWEEN THE UNITED STATES AND CANADA AND OVERRIDING FEDERAL INTERESTS THAT REQUIRE THE FLORIDA COURTS TO GRANT COMITY BY ENFORCING THE PETITIONER'S JUDGMENT.

The refusal of the Florida courts to enforce Petitioner's valid Canadian judgment against those responsible for her husband's illegal, forcible abduction from Canada is in direct conflict with international agreements between the United States and Canada and with overriding national interests and federal public policy that oppose the lawless abduction of persons from other countries generally and in this case which is deeply resented in Canada.

There is no dispute as to the validity of the judgment of the Supreme Court of Ontario in favor of Petitioner. The principles of international comity require the enforcement of a foreign judgment unless enforcement would be so abhorrent as to offend the sensibilities or morality of the forum. The Florida court based its decision not to enforce the valid judgment solely on its own view of Florida public policy grounds, without reference to federal public policy interests and agreements between the United States and Canada that would be undermined by this assertion of Florida public policy. The Petition should be granted to resolve this fundamental conflict between state public policy interests and the overriding interests of the federal government requiring enforcement of Petitioner's judgment.

The United States has an affirmative duty to deter transborder bounty hunting from Canada to the United States. This obligation was specifically set out in an exchange of letters between Secretary of State Shultz and Joe Clark,

Secretary of State for External Affairs of Canada. The letter included the following language:

> The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters", is an extraditable offense under the United States-Canada Extradition Treaty....
>
> Canada and the United States agree to cooperate to deter such transborder abductions.

(App. G, pp. A42-A43).

The Canadian government informed the Florida courts that,

> the interpretation of Florida public policy in the summary judgment is contrary to the public policy of the United States as evidenced in the January 11, 1988 Exchange of Letters Constituting an Understanding between the Government of Canada and the government of the United States concerning the Protocol Amending the Treaty on Extradition.

(Canada Amicus Brief, at App. F, p. A35). The Florida courts declined to give any weight to the exchange of letters between the United States and Canada, or, indeed, to any of the important federal interests at stake in the recognition of Petitioner's judgment.

United States v. Pink, 315 U.S. 203 (1942), made clear that the Supremacy Clause extends to international agreements. "[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. Then the power of a state to refuse

enforcement of rights based on foreign law which runs counter to the public policy of the forum must give way before the superior federal policy evidenced by a treaty or international compact." *Pink*, 315 U.S. at 231.

Even if the court were not to interpret the exchange of letters and extradition treaty itself as requiring the enforcement of the judgment as a matter of our domestic law, they evidence a clear federal policy. The Supremacy clause of the constitution and *Pink* make clear that State public policy interests must yield to federal policy interests.

At issue here is whether a Canadian judgment should be enforced, pursuant to a treaty and subsequent agreements between Canada and the United States. "Power over external affairs is not shared by the states; It is vested in the national government" *Pink*, 315 U.S. at 233. "If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted." *Pink, 315 U.S.* at 238. As outlined below, Florida's perceived policy interest is in direct conflict with federal foreign policy interests. The Florida court's failure, not only to give effect to superior federal policy, but even to consider federal policy, is a violation of the Supremacy Clause of the Constitution of the United States. U.S. CONST. art VI, cl. 2.

Florida's refusal to enforce the judgment runs contrary to the clearly articulated intent of the extradition treaty between the United States and Canada to deter abductions. Secretary of George Shultz recognized the negative effects that Mr. Jaffe's abduction was having on United States-Canada relations when he wrote to the Probation and Parole Commission of the State of Florida to urge board to grant parole to Sidney Jaffe. The letter stated, "the Jaffe case threatens to have a generally deleterious effect on our relations with Canada. . . . It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most

important and highly valued neighbors, allies and trading partners."[9]

"Transborder bounty hunting has been condemned by the international community. It is the criminal offense of kidnapping in Canada, the United States and Florida; kidnapping is an extraditable offense in both countries." *Canada Amicus Brief*, App.F,p.A37. There is no doubt that every nation must take all necessary steps to prevent people within its borders from engaging in the violation of the territorial sovereignty of other nations in this way.

In Ker v. Illinois, 119 U.S. 436 (1886), private damage remedies were seen as the appropriate remedy for illegal transborder abductions. "The party himself would probably not be without redress, for he could sue . . . in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action." *Ker*, 119 U.S. at 425. The decisions below undermine the foundation of the *Ker-Frisbie* doctrine by eliminating a key means to deter such conduct and, in fact, sending a signal that bounty hunters will be protected in Florida from civil sanctions for their wrongs. Florida's vast extension of the fugitive from justice doctrine overreaches its policy goals and is completely at odds with this country's international obligations.

It is clear that the kidnapping of Sidney Jaffe was an illegal act that was inconsistent with U.S. public policy and international law. Indeed whether Mr. Jaffe was in fact a

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[9] Daniel McGovern, principal deputy legal advisor, United States Department of State, elaborated on Mr. Shultz's letter at the bond hearing in *State of Florida v. Jaffe*, Case No. 83-638-CF-J (7th Fla. Cir. Ct. 1983) on September 30, 1983. "The issue of Mr. Jaffe's removal from Canada has been raised at nearly every high level contact between our two countries in the past two years. It has diverted attention from important and substantive issues which need to be addressed between these two important friends, neighbors, allies and trading partners. It has, in short, acted as a very significant irritant in our relationship."

fugitive from justice is irrelevant because, as then Secretary of State Shultz has stated, there was a legal apparatus which the respondents should have utilized: "As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty." (App. F, pp.A37-A38). That the United States government is of the view that the abduction was illegal is further evidenced by the extradition from the United States to Canada of the two men who abducted Mr. Jaffe.

The Court of Appeals' opinion offers a safe haven from civil liability for those who engage in transborder kidnappings in violation of U.S. law, Canadian law and international law. The decisions below make a mockery of the State Department's and the Justice Department's efforts in this case to assure Canada that the United States would take all appropriate steps to deter such abductions. Under *United States v. Pink*, *supra*, the Florida decision impairs the policies underlying the extradition treaty between the United States and Canada, the formal exchange of letters between the United States and Canada in this case and general principles of international law applicable to and accepted by the United States government.

The decisions below are especially egregious given the long history of satisfactory extradition relations between the United States and Canada. The United States and Florida have a paramount interest in having American judgments honored in Canada. By impermissibly refusing to enforce a valid Canadian judgment, serious consequences could ensue from which all states would suffer. If sufficient evidence against Mr. Jaffe existed and it was properly presented, Mr. Jaffe could have been extradited to the United States under the extradition treaty between the United States and Canada. Indeed, Canada has never said that it would, if asked, refuse extradition of Mr. Jaffe.

"In Florida, the rules of comity may not be departed from except to protect the citizens of our state or some paramount public policy." *Belle Island Inv. Co., LTD v. Feingold,* 453 So.2d 1143, 1145 (Fla.App. 3 Dist.1984). The Florida courts declined to give effect to Petitioner's judgment because of the state interest in not allowing Mr. Jaffe to benefit in any way after refusing to come back to Florida to stand trial. As will be discussed below, Florida had no legitimate public policy interest in denying petitioner enforcement of her judgment because she had been harmed by an illegal abduction and is not a fugitive from justice.

The invocation of the "fugitive" doctrine by the Florida courts is at odds with its own law and conflicts with paramount federal public policy interests favoring comity discussed above. To deny enforcement of the judgment shows a blatant disrespect for the Canadian courts and rewards Respondents for both conducting an illegal abduction and mounting an inadequate defense in the Canadian courts. More importantly, Florida, while failing to demonstrate a paramount state policy that would allow it to deny comity to the Canadian judgment under its own laws, has denied comity in a situation where international agreements between the United States and Canada and overriding federal policy demand comity.

The United States interest in providing for the enforcement of foreign judgments in all but the most exceptional circumstances is extremely strong, especially in a case like this where the enforcement of Petitioner's judgment would deter lawless activities the United States has bound itself to deter. The Florida courts, by refusing to enforce Petitioner's judgment, impermissibly denied Petitioner her right of access to the courts; undermined the principle of comity; violated the policy interests behind the extradition treaty with Canada; and violated international customary norms regarding territorial sovereignty.

II. THE FLORIDA JUDGMENT BELOW VIOLATES PETITIONER'S RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION.

The only reason given by the Florida court for not enforcing Mrs. Jaffe's valid Canadian judgment is that it would violate Florida public policy to allow a fugitive from justice to make use of the courts, or to allow a wrongdoer to benefit from his wrongdoing. No one alleges that Mrs. Jaffe is a fugitive or a wrongdoer. The decisions below rest wholly on the assertion that Mrs. Jaffe's claims are entirely derivative of her husband's claims. This assertion is false.

Agents of the Respondents, Snow and Accredited, kidnapped Mr. Jaffe in violation of the laws of Canada and the United States. Canada sought extradition of the actual kidnappers, and subsequently tried and convicted them. The extradition of the kidnappers from Florida to Canada was upheld in U. S. courts. The Canadian court also applied civil remedies, and issued a separate judgment awarding damages specifically to Mrs. Jaffe because of the harm she suffered as a result of the tortious abduction and criminal kidnapping of her husband. The Respondents were afforded due process as defendants in the Canadian courts. Mrs. Jaffe brought this action in the Florida courts to enforce a valid Canadian judgment in favor of Mrs. Jaffe, not Mr. Jaffe.

Mrs. Jaffe has a fundamental right to have access to the courts, and not to be deprived of her liberty or property interests without due process of law. Access to the courts is a fundamental right. *Boddie v. Connecticut*, 401 U.S. 371 (1971). Mrs. Jaffe sought access to the courts to vindicate her own individual rights. When Mr. Jaffe was kidnapped Mrs. Jaffe was deprived of a fundamental right -- that of marital association.

The court has long recognized marital choice, privacy, and association as belonging to the realm of fundamental liberties. *Zablocki v. Redhail*, 434 U.S. 374, 383-384 (1978).

Zablocki cites the major cases, especially *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The continued association of family members has also been recognized as meriting due process protection. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

The Canadian judgment awarded Mrs. Jaffe damages as a remedy for the violation of her individual rights. By wrongly refusing to enforce this judgment the Florida court has deprived Mrs. Jaffe of her liberty and property interests without due process of law.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

August 9, 1993

Respectfully submitted,

PAUL L. HOFFMAN
Counsel for Petitioner*
Ruth Jaffe

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*Counsel for Petitioner wishes to acknowledge the contributions of Joshua Friedes and Bruce Hall, law students at the University of Colorado School of Law and the University of Southern California Law Center, respectively, to the preparation of this brief.

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE
STATE OF FLORIDA

FIFTH DISTRICT JULY TERM 1992

RUTH JAFFE,

Appellant,

v. CASE NO. 91-1918

HARDY M. SNOW, JR.
and ACCREDITED
SURETY & CASUALTY
COMPANY, INC.,

Appellees.
_____/

Opinion filed November 13, 1992

Appeal from the Circuit Court
for Orange County,
Rom W. Powell, Judge.

Steven L. Brannock, of Holland & Knight
Tampa, and Jenny Hatfield-Lyon, of
Davis, Ward & Beck, Toronto, Ontario,
for Appellant.

E. Thom Rumberger and Sharon L. Stedman,
of Rumberger, Kirk & Caldwell, Orlando,
for Appellees.

Raymond T. Elligett, Jr., of Schropp, Buell & Elligett, P.A., Tampa, for Amicus Curiae of the Government of Canada

M. Roy Goldberg, of Davis, Graham & Stubbs, Washington, D.C., for Amicus Curiae of the International Human Rights Law Group.

SHARP, W., J.

Ruth Jaffe appeals from a final summary judgment which denied her petition to recognize and enforce a large money judgment she obtained in Canada against Accredited Surety & Casualty Company, Inc., a Florida company, and its president, Hardy Snow, a Florida resident. The trial judge based his decision not to recognize and enforce the Canadian judgment on the sole ground that to do so would violate the public policy of Florida. We agree and affirm.

This is an unusually complicated case overlaid by a tide of other court proceedings in Florida, the United States federal courts and Canada.[1] Because the proper application of the public-policy bar to granting comity to the Canadian judgment turns on these unique facts and collateral court proceedings, we will recite them in some detail. We borrow in part from the

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[1] Jaffe v. Sanders, 463 So.2d 318 (Fla. 5th DCA 1984); Jaffe v. State, 438 So.2d 72 (Fla. 5th DCA), *rev. dismissed*, 436 So.2d 99 (Fla. 1983); State ex rel. Boyles v. Florida Parole and Probation Commission, 436 So.2d 207 (Fla. 1st DCA 1983); Accredited Sur. & Cas. Co., Inc. v. State, 418 So.2d 378 (Fla. 5th DCA 1982); Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987), Jaffe v. Grant, 793 F.2d 1182 (11th Cir.), *reh. denied*, 803 F.2d 1185 (11th Cir. 1986), *cert. denied*, 480 U.S. 931, 107 S.Ct. 1566, 94 L.Ed.2d 759 (1987); Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983); Jaffe v. Boyles, 616 F.Supp. 1371 (W.D.N.Y. 1985); Jaffe v. Miller, No. 6103/85 (Ontario Court - General Division Nov. 22, 1990); Jaffe v. Dearing, Nos. 5236/85 & 10453/86 (Ontario Court of Justice Nov. 14, 1991).

summary judgment entered below and recitations by other courts which have been called upon to deal with various phases of the Jaffe saga.

The trial judge found:

> In 1980, Sidney L. Jaffe ("Mr. Jaffe"), a U.S. citizen, was charged in the Circuit Court of Putnam County, Florida, with 28 counts of violations of the 'Florida Uniform Land Sales Practices Law,' section 498.033(31), Florida Statutes (1979). A violation of this statute is a felony crime. After his arrest, Mr. Jaffe posted a $137,500 bail bond written by Accredited in order to secure his release from jail, and immediately went to Canada where he and Mrs. Jaffe (Ruth) took up residence...

The copy of the bond in the record discloses that Sidney gave as his residence an address in San Francisco, California, and he pledged not to change his address without notice to Accredited. The bond contains the usual promise to appear in the Florida criminal case, and it also gives the surety the express right to apprehend, arrest, and surrender his principal to "the proper official at any time provided by law." This latter provision is consistent with case law in the United States, which permits a bondsman to take his principal by force from any place he is found, within the United States, back to the proper jurisdiction for trial.[2] Apparently the law of Canada is different from Florida's on this issue, and Accredited did not have common law authority to return Sidney from

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[2] See Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983); Ker v. People of State of Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886).

Canada to Florida, under Canadian law. *Kear v. Hilton,* 699 F.2d. 181 (4th Cir. 1983).

But, we are getting ahead of the story:

> On the day he (Jaffe) was scheduled for trial, Mr. Jaffe failed to appear. A motion for continuance filed by his attorneys was denied, a warrant was issued for his arrest, and Accredited's bail bond was forfeited.[1] The prosecuting attorney then filed a criminal charge of Failure to Appear, section 843.15(1)(a), Fla.Stat. (1979). A violation of this statute is a felony crime. The prosecuting attorney subsequently made two applications to the Florida Governor seeking to extradite Mr. Jaffe from Canada, both of which applications were denied. The record does not show the basis for the denials.[2] Mr. Jaffe remained in Canada and 'exhibited a determination to remain there in violation of his undertaking to return to Florida to answer the charges.' *Kear* at 181, 182.
>
> Snow and Accredited then hired two professional bail recovery agents, Johnson and Kear, to go to Canada, apprehend Mr. Jaffe and surrender him to the Putnam County Sheriff, which they did.[3] Mr. Jaffe was tried, convicted, and sentenced on all 28 counts of Unlawful Land Sales Practices; however, his convictions and sentences were later reversed. His convictions and sentence for Failure to Appear was affirmed. *Jaffe I.* Contrary to plaintiff's assertion, the Unlawful Land Sales Practices charges were not 'unfounded.' As the District Court of Appeal made clear in *Jaffe II,* the reversals were not based upon insufficient evidence but rather upon the legal insufficiency of the charging document.

[1] Accredited paid the $137,500 to Putnam County. Upon Mr. Jaffe's return to custody there, $37,500 was remitted to Accredited. Putnam County kept the remaining $100,000.

[2] Unlawful Land Sales Practices and Failure to Appear are not among the extraditable offenses listed in the treaty between our two countries. *See* Art. 2 Treaty On Extradition Between the United States of America and Canada (1976) and annexed schedule, para s.1-30. Consequently, Canada would not have been obligated to surrender Mr. Jaffe on those charges, even if (a) formal extradition request had been made by the Florida Governor. [In *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987), the court said the extradition applications were disapproved because of improper "form."]

[3] The record does not reflect that the circumstances of Mr. Jaffe's apprehension by the bail recovery agents were aggravated. Using a ruse, the agents took Mr. Jaffe into their custody, placed him in mechanical restraints, transported him by automobile across the border into the United States, allowed him to telephone his son, then transported him by airplane to Florida and after landing, took him by automobile to the Putnam County Jail. *See Kear.*

Prior to the reversal of the land sales counts on appeal, Jaffe was indicted in Putnam County for organized crime charges in connection with the fraudulent land sales. After serving part of his time on the failure to appear crime, Jaffe was paroled. In 1983 he was again allowed to post a bond (for $150,000) to secure his return to trial on the organized crime

charges in Putnam County. *See Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987).

Jaffe traveled back to Canada, but has not yet reappeared in Florida. The second bond was forfeited in 1985. He has not at this time been brought to trial on those charges.

> Safe beyond the borders of the United States:
> [i]n 1985, Mr. Jaffe and Mrs. Jaffe brought suit in the Supreme Court of Ontario, Canada, against Snow and Accredited and other defendants seeking money damages for Mr. Jaffe's tortious abduction.[4]
>
> Snow and Accredited appeared in the action through Canadian counsel, and after their motions to dismiss based on grounds of want of personal jurisdiction and *forum non conveniens* were denied, they declined to further defend the action. On November 22, 1990, the Canadian court entered a separate judgment in favor of Mrs. Jaffe only[5] against Snow and Accredited awarding her general damages in the amount of $25,000 Canadian dollars; special damages in the amount of $903,481.47 United States dollars and $88,293.56 Canadian dollars; prejudgment interest in the amount of $498,089.33 in United States dollars and $62,458.74 Canadian dollars the total amount to bear interest at the rate of 14% per annum.

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[4] In paragraphs 62 and 63 of her Complaint in the Canadian action, Mrs. Jaffe alleged the following damage elements: loss of consortium; mental and physical suffering; loss of income; expenditure of time and effort in an effort to redress the wrongful actions of the defendants and in the administration of her husband's affairs, expenses in visiting and obtaining her husband's release from his wrongful imprisonment.

[5] Curiously the record does not reflect that a judgment was entered in favor of Mr. Jaffe.

The two bondsmen or "recovery agents", Kear and Johnson, were extradited to Canada to stand trial on kidnapping charges. *Kear*. That court applied to this saga the "old adage that two wrongs do not make a right." *Kear* They were convicted and sentenced to "time served."

All parties in this case agree that other possible defenses to the recognition and enforcement of the Canadian judgment, such as lack of personal jurisdiction, or due process have not been sufficiently established by this record to support the summary judgment in Accredited's and Snow's favor. Thus this appeal stands or falls on the public policy grounds enunciated by the trial court.

As the trial judge stated, recognition and enforcement of a foreign country's judgment in Florida is a matter of "comity," and it is up to the courts of this state to make that determination in each particular case.[3] Recognition is not required by the Full Faith and Credit Clause of the Federal Constitution,[4] which is applicable to sister-state and United States territories' court judgments.[5]

Comity is therefore a more flexible concept than is required by the Full Faith and Credit Clause,[6] although Florida in the overwhelming number of cases, recognizes and

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[3] Ogden v. Ogden, 159 Fla 604, 33 So.2d 870 (1947); Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895); Hilarion Llanes, *Foreign Nation Judgments*, 31 U.Fla.L.Rev. 588, 591 (1979).

[4] U.S.Const. Art. IV, §1.

[5] Parker v. Parker, 155 Fla. 635, 21 So.2d 141, *cert. denied.* 326 U.S. 718, 66 S.Ct. 23, 90 L.Ed.2d 425 (1945).

[6] *See* Beckwith v. Bailey, 119 Fla. 316, 161 So. 576 (1935).

enforces the judgments of other nations.[7] This is particularly true of countries having a system of jurisprudence which has developed from the same historical roots as our own, such as Canada.[8]

However, no jurisdiction will give comity to the judgment of another nation that offends that jurisdiction's public policy and sense of moral justice.[9] In this case, had Sidney Jaffe sought to enforce a Canadian judgment against his surety in this state, there are many public policy reasons why a Florida court would refuse to recognize and enforce it, which go far beyond the fact that the law of Canada (bounty hunters cannot single-handedly arrest and return a bond-jumper to the court which accepted the bond) is different than Florida's law.

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[7] *See* Pawley v. Pawley, 46 So.2d 464 (Fla), *rev. denied*, 47 So.2d 546, *cert. denied.* 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed.2d 632 (1950).

[8] *See* Willson v. Willson, 55 So.2d 905 (Fla. 1951); Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976).

[9] The Restatement (Second) of the Foreign Relations Law of the United States §482 (1987) provides as follows:

> (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
>
> ***
>
> (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought...

See also Hilton v. Guyot, 159 U.S. at 164-167; Al-Fassi v. Al-Fassi, 433 So.2d 664 (Fla 3d DCA 1983), rev. denied, 446 So.2d 99 (Fla 1984).

See Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983) and *In re Walton*, 11 O.L.R. 94 (1905).

For one, Sidney Jaffe is a fugitive from justice in the eyes of the Florida courts, having "jumped bond" in this jurisdiction not once, but twice. And, there are still criminal charges pending against him in this state from which he has fled rather than faced. Simply stated, "a fugitive from justice is not entitled to call upon the resources of court for determination of his case." *Garcia v. Metro-Dade Police Department*, 576 So.2d 751, 752 (Fla. 3d DCA 1991); *United States v. One Lot of U.S. Currency Totalling $506,537*, 628 F.Supp. 1473, 1475 (S.D. Fla. 1986). Stated another way, a fugitive from justice "cannot eat his cake and have it too." *United States v. Eng*, 951 F.2d 461, 462 (2d Cir. 1991).

The United States Supreme Court and the Florida Supreme Court have long held that courts may dismiss the appeals of criminal defendants who flee the jurisdiction while their appeals are pending. *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970); *State v. Gurican*, 576 So.2d 709 (Fla. 1991). In *Molinaro*, the court held that while an escape does not strip the case of its character as an adjudicable case or controversy, the escape "disentitles" the defendant to call upon the resources of the court for determination of his claims. 90 S.Ct. at 498-499.

The federal appeals courts have extended the fugitive from justice doctrine beyond the facts of *Molinaro*. *See, e.g., United States ex rel. Bailey v. U.S. Commanding Officer of the Office of the Provost Marshal, U.S. Army*, 496 F.2d 324 (1st Cir. 1974) (soldier who was AWOL several times was not entitled to petition for habeas corpus relief); *Doyle v. United States Department of Justice*, 668 F.2d 1365 (D.C. Cir 1981), *cert. denied*, 455 U.S. 1002, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982) (fugitive from federal court processes could not pursue his lawsuit based on the Freedom of Information Act); *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980) (fugitive from justice on convictions for willfully attempting to evade

federal employment taxes was not entitled to appeal a Tax Court determination); *Schuster v. United States*, 765 F.2d 1047 (11th Cir. 1985) (fugitive from justice in a related criminal case was not entitled to seek review of a tax assessment made by the Internal Revenue Service).

The fugitive from justice doctrine has also been applied to bar criminal defendants from asserting or defending a claim in related civil forfeiture proceedings. *See, e.g., Garcia* (appeal from order permitting forfeiture of currency dismissed where appellant was a fugitive from the related criminal charges); *United States v. Eng* (defendant was disentitled from contesting a civil forfeiture proceeding involving real property if he continued to fight extradition which would return him to the United States to face criminal charges pending against him); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214 (11th Cir. 1989) (record owner of property seized by the government was not entitled to pursue a claim to the property where he was currently residing in Columbia and was avoiding criminal prosecution in the United States); *United States v. Forth-Five Thousand Nine Hundred Forty($45,940) in United States Currency*, 739 F.2d 792 (2d Cir. 1984) (Canadian who refused to appear at his arraignment on criminal charges in the United States on the ground that his appearance would be in violation of the immigration laws was not entitled to pursue his claim in related forfeiture proceeding); *United States v. Certain Real Property Located at 760 S.W. 1st Street, Miami, Florida*, 702 F.Supp. 575 (W.D.N.C. 1989) (claimant who was avoiding arrest on drug charges was not entitled to pursue his claims in related civil forfeiture proceedings); *United States v. One Lot of U.S. Currency Totalling $506,537* (claimant living in Aruba to avoid arrest on currency violation charges in the United States was not entitled to assert an interest in the money in the civil forfeiture action).

In *Garcia*, the court dismissed the appeal from a forfeiture order because the appellant failed to appear for his trial on the related criminal charges:

> Appellant, on the one hand, wields a sword against our judicial system by escaping criminal prosecution. On the other hand, appellant attempts to shield himself with the protection of his rights in the civil courts.

576 So.2d at 752. Finding this duplicitous approach "repugnant to our inherent sense of equity," the court adopted the federal fugitive from justice doctrine. 576 So.2d at 752. This echoes the sentiment expressed in *United States v. One Lot of U.S. Currency Totalling $506,537*:

> By way of providing context, this court notes that claimant's conduct is inherently inequitable. Claimant has taken advantage of the rights accorded litigants--but wants to avoid the Court's processes as a sword while attempting to simultaneously shield himself from the same type of judicial process. This type of conduct is, simply stated, unfair.

628 F.Supp. at 1476.

Secondly, persons who flaunt the orders of courts in this state will suffer their cases to be dismissed. For example, Florida courts have held that a party adjudged in contempt for disobeying an order of the trial court in the cause appealed from is not entitled to maintain the appeal until he has purged himself of the contempt. *Pasin v. Pasin*, 517 So.2d 742 (Fla. 4th DCA 1987), *rev. denied*, 528 So.2d 1183 (Fla. 1988); *In re Guardianship of Crawford*, 470 So.2d 816 (Fla. 1st DCA 1985); *Durham v. Durham*, 297 So.2d 857 (Fla. 4th DCA 1974); *Morris v. Rabara*, 145 So.2d 265 (Fla. 2d DCA 1962). As the court in *Morris* noted, "it is contrary to the principles of justice to permit one who has flaunted the orders of the court to demand judicial assistance. An appellate court is authorized to enforce an order made by the lower court and

which has been violated by a party to the proceedings." 145 So.2d at 267.[10]

Other jurisdictions similarly dismiss an appeal when the appellant is in contempt of the lower court. *See, e.g., Stone v. Bach,* 80 Cal.App.3d, 442, 145 Cal.Rptr. 599 (1978); *Steward v. Stewart,* 91 Ariz. 356, 372 P.2d 697 (1962). In *Steed v. Woods,* 475 S.W.2d 814 (Tex.App. 1972), the court dismissed the former wife's appeal from one order where she was in contempt for violating another order arising out of the same divorce action.

A party in contempt is likewise not entitled to a hearing or a trial of his cause out of which the contempt arose until he purges himself of the contempt. In *Palm Shores, Inc. v. Nobles,* 149 Fla. 103, 5 So.2d 52 (1941), the court held that the plaintiff had been properly head in contempt for failure to respond to interrogatories propounded by the defendant. The court also held that an outright dismissal with prejudice of the plaintiff's cause of action was too severe a sanction and denied due process of law. However, the court indicated that abatement of the proceedings until the plaintiff purged himself of the contempt would be proper. When it is the defendant who is in contempt, the court may refuse to consider his defenses until he has purged himself of the contempt by complying with the court's order. *Whiteside v. Whiteside,* 468 So.2d 407 (Fla. 4th DCA 1985). The courts may also refuse to consider a motion for modification filed by the party in contempt. *Pollock v. T. & M. Investments, Inc.,* 420 So.2d 99 (Fla. 3d DCA 1982), *rev. denied,* 430 So.2d 452 (Fla. 1983). *Accord Hilson v. Hilson,* 598 So.2d 955 (Ala.Civ.App. 1992); *Jones v. Hargrove,* 516 So.2d 1354 (Miss. 1987).

The courts have also declined to exercise jurisdiction where the plaintiff or petitioner is in contempt. *See, e.g.,*

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[10] *See also* Bronk v. Bronk, 46 Fla. 474, 35 So. 870 (1903) (court declined to review appeal from husband in divorce proceedings who was in contempt of court by escaping from custody of the sheriff).

Mondy v. Mondy, 428 So.2d 235 (Fla. 1983). In *Mondy*, the mother sought modification of an Idaho divorce decree to give her custody of the parties' children. The mother, however, had been held in contempt of the Idaho court for taking the children in violation of its custody order. The Florida Supreme Court held that Florida should not have exercised jurisdiction in this cause because the Idaho court had jurisdiction of the custody proceeding and because the mother had violated the "clean hands" provision of the Uniform Child Custody Jurisdiction Act.

Finally, Florida has a well-established public policy that our courts will not permit nor tolerate a person to benefit from his own wrongful act.[11] In this case, Sidney Jaffe breached his contract or bond given to Accredited and accepted by the Florida court that he would not leave his California residence without Accredited's permission, and that he would return promptly to face the criminal charges brought against him. *See Reese v. United States*, 76 U.S. 13, 19 L.Ed. 541, 9 Wall. 13 (1869). He failed to do so. Although his eventual forceful return by Accredited was wrongful in Canada's eyes, he, too, was at fault for not honoring his bond. Two wrongs do not make a rights, and neither wrongdoer should profit. *McMichael v. McMichael*, 158 Fla. 413, 28 So.2d 692 (1947).

Ruth Jaffe argues she should not be placed in her husband's shoes for purposes of recognition and enforcement of her judgment. However, the nature of her cause of action is derivative[12] and it was necessarily born out of Sidney

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[11] Ashwood v. Patterson, 49 So.2d 648 (Fla. 1951).

[12] "Derivative" is defined as "coming from another; taken from something proceeding... that which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another." Black's Law Dictionary 399 (5th ed. 1979).

Jaffe's tort suit for wrongful kidnapping.[13] She was not kidnapped. Sidney was. Any loss of consortium on her part is deemed to be a derivative cause of action in Florida.[14]

The fugitive from justice doctrine bars any claim or defense that is solely derivative of the fugitive's claim. *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane,* 868 F.2d at 1217 n.5; *United States v. $129,374 in United States Currency,*769 F.2d 583 (9th Cir. 1985), *cert. denied,* 474 U.S. 1086, 106 S.Ct. 868, 88 L.Ed.2d 901 (1986). In *$129,374 in United States Currency,* Gerald Geiger had been appointed conservator of his brother Lewis' estate and attempted to intervene in forfeiture proceedings involving property belonging to Lewis, who was a fugitive on the related criminal charges. The court held that if Lewis, as a fugitive from justice, were deprived of presenting any claim or defense in the action as a result of his fugitive status, the conservator of his estate must likewise suffer the same consequences when he seeks to advance the same claim or defense.

Here, Jaffe fled the jurisdiction of Florida in his land fraud case and did not appear at his second fraud trial. The fugitive from justice doctrine would bar any of Jaffe's claims for damages from his return to Florida by his bondsmen. Mrs. Jaffe's claims are derivative of her husband's and likewise are barred under the fugitive from justice doctrine.

Further, if Ruth Jaffe is allowed to recover the expenses and claims she sought and obtained in the Canadian judgment, it would permit her to profit from a wrongdoer's activity. The expenses of retaining counsel to defend Sidney

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[13] In her brief, Ruth Jaffe admits that her damages are those caused by the kidnapping of her husband by Snow and Accredited.

[14] *See* Ryter v. Brennan, 291 So.2d 55 (Fla. 1st DCA), *cert. denied,* 297 So.2d 836 (Fla. 1974) (even though a wife's consortium action is her own property right, the action is dependent upon proof of negligence on the part of the defendant and in that sense, is derivative from her husband).

in Florida and her visitation in Florida should rightfully have been spent, because Sidney should rightfully have returned to this jurisdiction to stand trial. To allow her to collect on any of these items as "damages" would be to reward the bondjumper. In addition, any loss of consortium on her part was in the eyes of the Florida courts a rightful loss, because Sidney should have rightfully been separated from her while he stood trial and served time in prison after his conviction. Her loss of consortium was thus the consequence of her husband's own wrong and she should not be allowed to benefit from it. *See Ashwood v. Patterson,* 49 So.2d 848 (Fla. 1951).

Accordingly, we affirm the judgment below refusing to recognize and enforce Ruth Jaffe's Canadian judgment.

AFFIRMED.

DAUKSCH and DIAMANTIS, JJ., concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

RUTH JAFFE,
Appellant,

v. CASE N. 91-1918

HARDY M. SNOW, JR., and ACCREDITED SURETY & CASUALTY COMPANY, INC.,
Appellee.
_____/

DATE: January 12, 1993

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, REHEARING EN BANC OR FOR CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE, filed November 30, 1992, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/
FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

APPENDIX C

SUPREME COURT OF FLORIDA

MONDAY, MAY 10, 1993

RUTH JAFFE,	*	
	*	CASE NO. 81,267
Petitioner,	*	
	*	DISTRICT COURT OF
v.	*	APPEAL, 5TH
	*	DISTRICT NO. 91-1918
HARDY M. SNOW,	*	
JR., ET AL.,	*	
	*	
Respondents.	*	
	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, MCDONALD, SHAW, GRIMES and HARDING, JJ., concur

APPENDIX D

IN THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI 91-1593

RUTH JAFFE,

Plaintiff,

vs.

HARDY M. SNOW, JR., and
ACCREDITED SURETY &
CASUALTY COMPANY, INC.,

Defendants.
_____/

FINAL SUMMARY JUDGMENT FOR DEFENDANTS

This is an action brought by Ruth Jaffe ("Mrs. Jaffe"), a Canadian resident, for recognition and enforcement of her Canadian money judgment against Hardy M. Snow, ("Snow") and Accredited Surety & Casualty Company, Inc. ("Accredited"), a citizen and resident of the State of Florida and a Florida corporation having its principal place of business in Orange County, Florida.

This case came on for hearing on June 24, 1991, on the parties' cross motions for summary judgment. The Court reviewed the pleadings, the Canadian judgment and complaint and the motions; listened carefully to the arguments of counsel; has read the legal memoranda furnished and studied many of the authorities cited therein, and has given the case careful consideration.

Under Florida law, a party may be granted a summary judgment if there is no genuine issue of material fact as demonstrated by the record made for the summary judgment hearing and such party is entitled to judgment as a matter of law on the undisputed material facts. Fla.R.Civ.P. 1.510(c); Carpineta v. Shields, 70 So.2d 573 (Fla. 1954). Since Florida courts have granted summary judgment enforcing foreign nation judgments, see e.g., Willson v. Willson, 55 So.2d 905 (Fla. 1952); Mathor v. Lloyds Underwriters, 174 So.2d 71 (Fla. 3rd DCA 1965); Bullen v. Her Majesty's Govt. of the U.K., 553 So.2d 1344 (Fla. 4th DCA 1989), rev. den. 567 So.2d 434 (Fla. 1990), it follows that summary judgment can be granted refusing to enforce such a judgment in a proper case. Indeed, plaintiff states that "(a)ll the parties agree that the question of enforcement of Mrs. Jaffe's Canadian judgment is a matter of law for the Court." (plaintiff's supporting memorandum, p.2)

For the purpose of stating the undisputed material facts in this judgment, this Court has relied upon portions of plaintiff's complaint, motion, supporting memorandum, appendices and facts appearing in three reported appellate opinions: Jaffe v. State, 438 So.2d 72 (Fla. 5th DCA 1983) ("Jaffe I"); Jaffe v. Sanders, 463 So.2d 318 (Fla. 5th DCA 1985) ("Jaffe II"); and Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983).

The material undisputed facts necessary for the disposition of the cross motions are as follows. In 1980, Sidney L. Jaffe ("Mr. Jaffe"), a U.S. citizen, was charged in the Circuit Court of Putnam County, Florida, with 28 counts of violations of the "Florida Uniform Land Sales Practices Law", Section 498.033(3), Florida Statutes (1979). A violation of this statute is a felony crime. After his arrest, Mr. Jaffe posted a $137,500.00 bail bond written by Accredited in order to secure his release from jail, and immediately went to Canada where he and Mrs. Jaffe took up residence. On the day he was scheduled for trial, Mr. Jaffe failed to appear. A motion for continuance filed by his attorneys was denied, a warrant was

issued for his arrest, and Accredited's bail bond was forfeited.[1] The prosecuting attorney then filed a criminal charge of Failure to Appear, Section 843.15(1)(a), Fla. Statutes (1979). A violation of this statute is a felony crime. The prosecuting attorney subsequently made two applications to the Florida Governor seeking to extradite Mr. Jaffe from Canada, both of which applications were denied. The record does not show the basis for the denials.[2] Mr. Jaffe remained in Canada and "exhibited a determination to remain there in violation of his undertaking to return to Florida to answer the charges." Kear at 181,2.

Snow and Accredited then hired two professional bail recovery agents, Johnson and Kear, to go to Canada, apprehend Mr. Jaffe and surrender him to the Putnam County Sheriff, which they did.[3] Mr. Jaffe was tried, convicted, and sentenced on all 28 counts of Unlawful Land Sales Practices; however, his convictions and sentences were later reversed. His conviction and sentence for Failure to Appear was affirmed. Jaffe I. Contrary to plaintiff's assertion, the Unlawful Land Sales Practices charges were not "unfounded". As the District Court of Appeal made clear in Jaffe II, the reversals were not based upon insufficient evidence but rather upon the legal insufficiency of the charging document.

Immediately upon his release from imprisonment, Mr. Jaffe returned to Canada. In 1985, Mr. Jaffe and Mrs. Jaffe brought suit in the Supreme Court of Ontario, Canada, against Snow and Accredited and other defendants seeking money damages for Mr. Jaffe's tortious abduction.[4] Snow and Accredited appeared in the action through Canadian counsel, and after their motions to dismiss based on grounds of want of personal jurisdiction and forum non conveniens were denied, declined to further defend the action. On November 22, 1990, the Canadian court entered a separate judgment in favor of Mrs. Jaffe only[5] against Snow and Accredited awarding her general damages in the amount of $25,000 Canadian dollars; special damages in the amount of $903,481.47 U.S. dollars and $88,293.56 Canadian dollars; pre-judgment interest in the

amount of $498,089.33 U.S. dollars and $62,458.74 Canadian dollars, the total amount to bear interest at the rate of 14% per annum.

Turning now to the law, this Court concludes that there are no treaties or statutes, state or federal, which compel the courts of Florida to recognize foreign nation judgments, nor does the full faith and credit clause of the United States Constitution require it. Rather, recognition or nonrecognition of such judgments in this state depends upon Florida common law principles of judicial comity. Warren v. Warren, 75 So.35 (Fla. 1917); Parker v. Parker, 21 So.2d 141 (Fla. 1945); Ogden v. Ogden, 33 So.2d 871 (Fla. 1947); Pawley v. Pawley, 46 So.2d 464 (Fla. 1950).

In Beckwith v. Bailey, 161 So. 577, 581 (Fla. 1935), the Florida Supreme Court, citing the leading United States Supreme Court case of Hilton v. Guyot, 159 U.S. 113, 16 S.Ct 139, 40 L.Ed. 95 (1895), recognized that "...comity...(in the legal sense) is neither a matter of absolute obligation or of mere courtesy and good will. It is...the recognition which one nation or state allows within its territory to the ...judicial acts of another nation or state, having due regard to both international duty and convenience, and to the rights of its own citizens...."

In Warren, the Florida Supreme Court adopted the general statement of conditions for recognition enunciated in Hilton, which are that "(t)here has been full opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of law under which it is sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect...." Warren, 75 So. at 44; Hilton, 159 U.S. at 202-03 (emphasis supplied).

Quoting with approval from several treatises, the Hilton court recognized the principles that "'(e)very nation must be the final judge for itself, not only of the nature and extent of the duty (to give effect to foreign nation judgments), but of the occasions on which its exercise may be justly demanded'", 159 U.S. at 190; and that "'...the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as many be found just and equitable'." Id.

Defendants concede the authenticity of the Canadian judgment and compliance with due process conditions leading to its rendition. They do not claim prejudice or fraud. However, they raise several defenses, although inartfully, none of which have merit[6] save one--that Mrs. Jaffe's judgment should be refused recognition on public policy grounds.

Under Florida common law, the doctrine of comity precludes recognition of a foreign nation judgment where "special reasons" exist. Hilton. One of those special reasons is that such a judgment is contrary to the public policy of Florida. Id. A foreign nation judgment may be contrary to a state's public policy if it conflicts with the state's interests, is inconsistent with its laws and/or is repugnant to fundamental notions of what is decent, equitable and just in the forum state. Id. See also Ackerman v. Levine, 788 F.2d 830, 841-2 (2d Cir. 1986) ("A judgment is unenforceable as against public policy to the extent that is it 'repugnant to fundamental notions as to what is decent and just in the State where enforcement is sought.'") Tahan v. Hodgson, 662 F.2d 862, 864 (D.C.Cir. 1981); Restatement 2d Conflict of Laws, Sec. 117 comment c (1971);Reese, Judgments Rendered Abroad, 50 Columbia L. Rev. 783, 797 (1950) ("...(o)ur courts should not be required to enforce a judgment based upon a cause of action which offends against our notions of what is decent and just, or which offends against our laws").

Two cases have been cited from time to time by courts and commentators as examples of the application of these

principles. In De Briemont v. Penniman, 7 Fed. Cas. 309, No.3, 715 (C.C.S.D.N.Y. 1873), a Federal Circuit Judge refused to enforce a French decree requiring a U.S. citizen to support his adult French son-in-law. In In re: Estate of Davis, 219 N.Y.S.2d 533 (Sup. Ct. 1961), affirmed 227 N.Y.S.2d 894 (1962), the New York Court denied recognition to an Italian judgment which contravened a New York statute disallowing entry of judgments against persons who died during the litigation.

Canadian tort law under which Mr. and Mrs. Jaffe's causes of action were brought is different from Florida law. Both under the common law and statutory law of this state, a surety such as Accredited may arrest the principal within the state, both before and after the forfeiture of a bail bond. Register v. Benton, 73 So.2d 187 (Fla. 1975); Sections 903.02 and .29, Florida Statutes (1979). Under Florida common law, the surety may delegate to another person the right to make the arrest (but if the surety delegates a law enforcement officer, then the procedure set forth in Section 903.29 must be followed). Register. "One under bail is in the vicarious custody of his bondsman whose 'dominion is a continuance of the original imprisonment, and the principal may be apprehended by .his bondsman even under extreme circumstances.' Taylor v. Taintor, 16 Wall 366 83 U.S. 366, 21 L.Ed. 2d 287...." Id. at 188. Consequently, had the apprehension of Mr. Jaffe by defendants' bail recovery agents occurred within the territorial boundaries of Florida, Mr. and Mrs. Jaffe would have had no cause of action under the tort law of this state. Of even more significance, the public policy of Florida as expressed through its decisional and statutory law expressly favors and sanctions the apprehension of a bond jumper within the state by his surety or its agent.

Furthermore, Mr. Jaffe's act of failing to appear in court was a breach of his contractual obligation to Accredited under their bail agreement and a crime against the State of Florida for which he was duly convicted. it was his wrongful criminal act in jumping bail which directly caused Snow and

Accredited to commit the acts found to be tortious in Canada which formed the basis for Mr. and Mrs. Jaffe's Canadian action against them. If Mr. Jaffe had obtained and sought to enforce a Canadian judgment against defendants here, to allow it would not only be inconsistent with this State's interests but patently inequitable, for Equity says that "no one shall be permitted to take advantage of his own wrong, or found any claim upon his own inequity, or profit from his own crime." Ashwood v. Patterson, 49 So.2d 848, 850 (Fla.1951).

Finally, since under principles of comity public policy reasons would foreclose enforcement of any judgment Mr. Jaffe has obtained or might obtain in the Canadian action, it logically follows that the same is true of Mrs. Jaffe's judgment. This is so because the claim upon which it was based was intertwined with, solely derivative of and utterly dependent upon that of her husband. And if she were to collect all or a part of her judgment through the processes of this Court, he would stand to benefit, even if only indirectly.

In closing it should be stated that nothing in this judgment should be construed as condoning the acts of Snow and Accredited and their agents which caused the events in Canada. Now that the Kear case is on the books, the criminal laws of Canada and the extradition treaty between our two countries should provide a sufficient deterrent against that type of activity in the future. This Court agrees with the suggestion of Judge Murnaghan in Kear that it might be profitable to pursue through diplomatic and political channels a system of cooperation between officials of our two countries for the return of all American bail jumpers. Finally, lest it be thought otherwise, this Court has the utmost respect for the nation of Canada, its laws, its jurists and its legal system, and only holds that because of the peculiar facts and circumstances of this case, it falls within those very few exceptions where an American state court should decline to enforce a foreign nation's judgment.

Accordingly, based upon all of the foregoing, it is **ORDERED AND ADJUDGED** that:

1. Plaintiff's Motion for Summary Judgment is denied.

2. Defendants' Motion for Summary Judgment is granted, and Final Summary Judgment is hereby entered in favor of defendants Hardy M. Snow and Accredited Surety and Casualty Company, Inc. Plaintiff will take nothing by this action and go hence without day. Defendants shall recover their taxable costs, if any.

3. Both parties' motions for attorney's fees and other pending motions are denied.

DONE and ORDERED in chambers at Orlando, Orange County, Florida, This 26 day of July, 1991.

/s/ Rom W. Powell
CIRCUIT JUDGE

1. Accredited paid the $137,500 to Putnam County. Upon Mr. Jaffe's return to custody there, $37,500 was remitted to Accredited. Putnam County kept the remaining $100,000.

2. Unlawful Land Sales Practices and Failure to Appear are not among the extraditable offenses listed in the treaty between our two countries. See Art. 2, Treaty on Extradition Between the United States of America and Canada (1971) and Annexed Schedule, para.s 1-30. Consequently, Canada would not have been obligated to surrender Mr. Jaffe on those charges even if formal extradition request had been made by the Florida Governor.

3. The record does not reflect that the circumstances of Mr. Jaffe's apprehension by the bail recovery agents were aggravated. Using a ruse, the agents took Mr. Jaffe into their custody, placed him in

mechanical restraints, transported him by automobile across the border into the United States, allowed him to telephone his son, then transported him by airplane to Florida and after landing, took him by automobile to the Putnam County Jail. See Kear.

4. In paragraphs 62 and 63 of her Complaint in the Canadian action, Mrs. Jaffe alleged the following damage elements: loss of consortium; mental and physical suffering; loss of income; expenditures of time and effort in an "effort to redress the wrongful actions of the defendants" and in the administration of her husband's affairs; expenses in visiting and obtaining her husband's release from his wrongful imprisonment.

5. Curiously, the record does not reflect that a judgment was entered in favor of Mr. Jaffe.

6. Defendants' "two dismissal" defense cannot be maintained for the simple reason that Mrs. Jaffe was not a co-plaintiff with Mr. Jaffe in one of the two federal suits which were voluntarily dismissed, and even if she had been a co-plaintiff in both, those two suits were based upon alleged violations of the Federal Civil Rights Act and other tort claims, whereas the complaint herein is based upon a claim for recognition of a foreign nation judgment, an entirely different claim.

APPENDIX E

Court File No. 6103/85

ONTARIO COURT (GENERAL DIVISION)

THE HONOURABLE MR. JUSTICE MATLOW	)))	THURSDAY, THE 22ND DAY OF NOVEMBER, 1990

BETWEEN:

SIDNEY L. JAFFE and RUTH JAFFE

Plaintiffs

- and -

JOE C. MILLER, II, METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 539, DANIEL J. KEAR, FRANCES L. CILES, HANK M. SNOW, JR., WILLIAM HATCH, LOUIS R. STARK, CLYDE E. SHOEMAKE, STEPHEN L. BOYLES, ACCREDITED SURETY & CASUALTY CO., TERRENCE SCHMIDT, CHARLES W. GRANT, PATRICIA SILVER, THE ATTORNEY GENERAL OF THE STATE OF FLORIDA, FLORIDA BOARD OF RISK MANAGEMENT, ORMARK ENTERPRISES LIMITED, PUTNAM COUNTY FLORIDA, SMITH HANDLER, SMITH, WERNER JACOBOWITZ & FRIED P.A. KELLY SMITH, CHARLES BAIRD, GARY KELLER, BONNIE ALLENDER, JOHN EUBANKS, TIMM JOHNSON, GLENN E. NORRIS

Defendants

JUDGMENT

This motion made by plaintiff, Ruth Jaffe, for final judgment against the defendants, Accredited Surety & Casualty Co. ("Accredited"), and Hank M. Snow, Jr. ("Snow"), having been noted in default on July 3, 1990, was heard this day at Osgoode Hall Toronto, Ontario.

ON READING the notice of motion dated November 20, 1990, the notice of action dated September 20, 1985, the statement of claim dated October 21, 1985 the order of Master Garfield dated August 4, 1989 and the order of Master Sirois dated April 4, 1990, which orders confirmed the jurisdiction of this Honourable Court over, *inter alia,* the defendants Accredited and Snow in this action, the proof of service of the statement of claim, filed, and upon reading the affidavit of Ruth Jaffe and exhibits annexed thereto sworn October 2, 1990 and the affidavits of Sidney L. Jaffe and exhibits annexed thereto, each sworn on November 19, 1990, and upon hearing the submissions of counsel for the plaintiffs;

1. THIS COURT ORDERS that Accredited and Snow pay Ruth Jaffe general damages in the amount of $25,000.00 Canadian Dollars.

2. THIS COURT ORDERS that Accredited and Snow pay Ruth Jaffe special damages in the amounts of $903,481.47 United States Dollars, in accordance with Section 131 of the Courts of Justice Act, and $88,293.56 Canadian Dollars.

3. THIS COURT ORDERS that Accredited and Snow pay Ruth Jaffe pre-judgment interest pursuant to Section 138 of the Courts of Justice Act on the damages provided in paragraphs 1 and 2 herein, from April 11, 1986 to this date, in the amount of $498,089.33 United States Dollars, in accordance with Section 131 of the

Courts of Justice Act, as amended, and $62,458.74 Canadian Dollars.

5. THIS COURT ORDERS that Accredited and Snow pay Ruth Jaffe the costs of this motion fixed at $2,000.00 Canadian Dollars.

THIS JUDGMENT BEARS INTEREST at the rate of 14 per cent per year commencing on this date.

Entered at Toronto
In film No. 830
ON: 28 11 1990
As document No. 86

APPENDIX F

IN THE FIFTH DISTRICT COURT OF APPEAL
DAYTONA BEACH, FLORIDA

RUTH JAFFE,
Appellant,

vs.

CASE NO. 91-1918

HARDY M. SNOW, JR.,
and ACCREDITED
SURETY CASUALTY
COMPANY, INC.,
Appellees.
_____/

THE GOVERNMENT OF CANADA'S AMICUS BRIEF

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INTEREST OF THE AMICUS CURIAE

The trial court's summary judgment was purportedly based on the public policy of Florida in relation to an act in Canada that constituted both a breach of Canada's criminal law and a breach of international law. The Government of Canada submits that the interpretation of Florida public policy in the summary judgment is contrary to the public policy of the United States as evidenced in the January 11, 1988 Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition. The Government of Canada also submits that it is not Florida policy to sanction criminal acts and breaches of international law whether they take place in Florida or in a foreign country such as Canada.

STATEMENT OF THE CASE AND FACTS

Mrs. Jaffe sued the Defendants in the Supreme Court of Ontario, seeking damages in connection with expenses incurred following the wrongful abduction of Sidney Jaffe from Canada to the United States by United States bounty hunters hired by the Defendants. On November 22, 1990, the Supreme Court of Ontario found in favor of Ruth Jaffe and awarded her a money judgment (R-103).[15]

Mrs. Jaffe then brought this action in the Ninth Judicial Circuit in and for Orange County, Florida, seeking recognition and enforcement of the judgment rendered by the Supreme Court of Ontario, and the Defendants defended the action. The trial court entered summary judgment in favor of the Defendants. Mrs. Jaffe appeals that ruling to this Court.

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[15] For the purpose of this amicus brief, the Government of Canada relies on the facts set forth in the summary judgment (at R 100-110), unless otherwise noted.

ISSUE ON APPEAL

THE GOVERNMENT OF CANADA'S POSITION ON CANADA - UNITED STATES RELATIONS.

SUMMARY OF ARGUMENT

There is no dispute as to the validity and conclusiveness of the judgment of the Supreme Court of Ontario in favor of Mrs. Jaffe. The issue on appeal is whether it offends public policy to enforce the money judgment that was properly awarded to Mrs. Jaffe by the Supreme Court of Ontario. In other words, would enforcement be so abhorrent as to offend the sensibilities or morality of the forum if Mrs. Jaffe were able to collect in Florida on a money judgment rendered in accordance with the applicable law in a court of competent jurisdiction of a province of Canada?

ARGUMENT

THE GOVERNMENT OF CANADA'S POSITION ON CANADA - UNITED STATES RELATIONS.

The Government of Canada's participation is based in part on the United States' position on the issue of transborder bounty-hunting and the reliance Canada may place on the undertakings of the United States Government to deter such activities and to exert its best efforts to inform those engaged in transborder bounty-hunting that such activities are illegal and that offenders will be subject to extradition. It is also grounded in concerns about the effective implementation of the Canada-United States Extradition Treaty, and the apparent willingness expressed in the summary judgment to sanction its contravention.

The abduction of Sidney Jaffe from his home in Toronto, Canada to Florida by U.S. bounty-hunters hired by

the Defendants was a blatant infringement of Canadian territorial sovereignty and was contrary the Canada-United States Extradition Treaty and international law.

Transborder bounty-hunting has been condemned by the international community. It is the criminal offense of kidnapping in Canada, the United States and Florida; kidnapping is an extraditable offense in both countries.[16] The Canadian Government filed formal protests with the United States Government objecting to the abduction and demanding Mr. Jaffe's release.[17] The United States Department of Justice and the United States State Department condemned the abduction of Mr. Jaffe from Canada as a violation of United States public policy.[18]

The gravity of the incident was recognized by United States Secretary of State George Shultz in the following words.

> ...it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.[19]

Secretary of State Shultz recognized the serious effect of the kidnapping on Canada-United States relations. He said:

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[16] Extradition Treaty List, included as part of exhibit U to Plaintiff's trial memorandum.

[17] See exhibit J to Plaintiff's trial memorandum.

[18] See exhibit T to Plaintiff's trial memorandum.

[19] See exhibit I to Plaintiff's trial memorandum.

> ...the Jaffe case threatens to have a generally deleterious effect on our relations with Canada.[20]

And he stated the public policy of the United States in this matter as follows:

> It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most important and highly valued neighbors...[21]

Canada sought extradition of the bounty-hunters. The United States Government refused to excuse or exonerate the bounty-hunters and extradited them to Canada where they were tried and convicted.[22] Extradition to Canada from Florida was not denied by the United States Government or the Florida Courts because of any activities that may have been undertaken by Mr. Jaffe in Florida. The bounty-hunters hired by Defendants were convicted; no justification for their actions could be found by the court in any activities carried out by Mr. Jaffe in Florida.

The policy of the United States Government concerning transborder bounty-hunting is aptly demonstrated in the January 11, 1988 Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending

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[20] Id.

[21] Id.

[22] Kear v. Hilton, 699 F.2d 181, 185 (4th Cir. 1983); Johnson v. Kear, (Ont. H.C. June 9, 1986), affirmed, 5 C.C.C. (3d) 574 (Ont. C.A. 1989).

the Treaty on Extradition.[23] The Exchange of Letters, signed by the United Stated [sic] Secretary of State and the Canadian Secretary of State for External Affairs, reads in part as follows:

> The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail-bonding companies...is an extraditable offense under the United States-Canada Extradition Treaty.

Both countries agreed to take action against transborder bounty-hunting:

> ...Canada and the United States agree to cooperate to deter such transborder abductions...

Of particular relevance in this appeal is the undertaking made in the letter by the United States to Canada, which reads as follows:

> [T]he United States will continue to exert its best efforts to inform those engaged in business as bail-bondsmen or bounty-hunters...of the positions set forth in this exchange of letters.

This policy applies to persons found in Canada irrespective of citizenship.

Canada has a right to rely on the undertaking set out in the 1988 Exchange of Letters. The summary judgment runs directly counter to the undertakings of the United States Government because, rather than sending a signal that transborder bounty-hunting will not be tolerated in the United

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[23] 27 I.L.M. 422 (1988), included in the appendix hereto.

States, it seeks to exonerate the bonding company whose agents illegally abducted Mr. Jaffe from Canada.

The Canada-United States Letter of Understanding should be respected and given consideration, where applicable, by United States Courts. in addition, state courts should not sanction circumvention of the Canada-United States Extradition Treaty. Florida did not petition the United States Government to request Mr. Jaffe's extradition, and Canada did not refuse a request for Mr. Jaffe's extradition: This is not a case where the extradition process was tried and failed. There was no justification for extraordinary measures to be taken; Florida has used the Treaty successfully before and since the Jaffe instance to obtain the return of fugitives. Instead of giving effect to the Letter of Understanding and the Extradition Treaty in the summary judgment, the trial court simply ignored them.

The Government of Canada submits that the trial court's reasoning that it was Mr. Jaffe's misconduct which caused the unlawful abduction to occur is incorrect (R 107). Under such reasoning, an alleged breach of contract, tort, or criminal act would "justify" any tort, even wrongful death, if the bounty hunters brought their man back "dead or alive."

CONCLUSION

It is respectfully submitted that the summary judgment is incorrect in its finding that enforcement of the decision of the Supreme Court of Ontario in the case of Ruth Jaffe v. Hardy Snow and Accredited Surety & Casualty Company, Inc. would offend public policy, and therefore must be reversed.

Respectfully submitted,

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APPENDIX G

TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND CANADA

[Excerpts.]

Treaty signed at Washington December 3, 1971;
And agreement amending the treaty
Effected by exchange of notes
Signed at Washington June 28 and July 9, 1974;
. . .
Entered into force March 22, 1976.

ARTICLE 2

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

SCHEDULE

8. Kidnapping; child stealing; abduction; false imprisonment.

12. Obtaining property, money or valuable securities by false pretenses or by threat of force or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood would or would not amount to a false pretense.

15. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.

16. Fraud by a banker, agent, or by a director or officer of any company.

APPENDIX H

PROTOCOL AMENDING THE TREATY ON EXTRADITION BETWEEN CANADA AND THE UNITED STATES OF AMERICA SIGNED AT WASHINGTON ON DECEMEER 3, 1971, AS AMENDED BY AN EXCHANGE OF NOTES ON JUNE 28 AND JULY 9, 1974

The Government of Canada and the Government of the United States of America;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at Washington on December 3, 1971, as amended by the agreement effected by an Exchange of Notes on June 28 and July 9, 1974 (hereinafter referred to as "the Extradition Treaty"):

Have agreed as follows:

ARTICLE 1

Article 2 of the Extradition Treaty is deleted and replaced by the following:

"Article 2

(1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.

(2) An offense is extraditable notwithstanding

(i) that conduct such as interstate transportation or use of the mails or of other facilities affecting interstate or

foreign commerce, required for the purpose of establishing jurisdiction, forms part of the offense in the United States, or

(ii) that it relates to taxation or revenue or is one of a purely fiscal character."

ARTICLE II

The SCHEDULE to the Extradition Treaty, as amended, is deleted.

ARTICLE III

Paragraph (2) of Article 3 of the Extradition Treaty is deleted. Paragraph (3) of Article 3 of the Extradition Treaty is amended to read as follows:

"(2) When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition."

ARTICLE IV

Paragraph (2) of Article 4 of the Extradition Treaty, as amended, is deleted and replaced by the following:

"(2) For the purpose of this Treaty, the following offenses shall be deemed not to be offenses within subparagraph (iii) of this Article:

(i) An offense for which each Contracting Party has the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution;

(ii) Murder, manslaughter or other culpable homicide, malicious wounding or inflicting grievous bodily harm;

(iii) An offense involving kidnapping, abduction, or any form of unlawful detention, including taking a hostage;

(iv) An offense involving the placing or use of explosives, incendiaries or destructive devices or substances capable of endangering life or of causing grievous bodily harm or substantial property damage; and

(v) An attempt or conspiracy to commit, or counselling the commission of, any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses."

ARTICLE V

Article 7 of the Extradition Treaty is deleted and replaced by the following:

"Article 7

When the person sought is being proceeded against or is serving a sentence in the requested State for an offense other than that for which extradition is requested, the requested State may surrender the person sought or postpone surrender until the conclusion of the proceedings or the service of the whole or any part of the sentence imposed."

ARTICLE VI

Paragraph (3) of Article 11 of the Extradition Treaty is deleted and replaced by the following:

"(3) A person arrested shall be set at liberty upon the expiration of sixty days from the date of arrest pursuant to such application if a request for extradition and the documents specified in Article 9 have not been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request and documents are subsequently received."

ARTICLE VII

The Extradition Treaty is amended by adding the following after Article 17:

"Article 17 bis

If both contracting Parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or to submit the case to its

competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

(i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;

(ii) the respective interests of the Contracting Parties;

(iii) the nationality of the victim or the intended victim; and

(iv) the availability and location of the evidence."

ARTICLE VIII

Notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, this Protocol shall apply in all cases where the request for extradition is made after its entry into force regardless of whether the offense was committed before or after that date.

ARTICLE IX

(1) This Protocol shall be subject to ratification in accordance with the applicable procedures of the Government of the United States and the Government of Canada and instruments of ratification shall be exchanged as soon as possible.

(2) The Protocol shall enter into force upon the exchange of instruments of ratification.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

EN FOI DE QUOI, les soussignés, dûment autorisés par leurs Gouvernements respectifs, ont signé le présent Protocole.

DONE in duplicate at Ottawa, this 11th day of January 1988, in the English and French languages, the two texts being equally authentic.

FAIT en double exemplaire à Ottawa, ce 11ième jour de Janvier 1988 en français et en anglais, chaque version faisant également foi.

/s/ Joe Clark

FOR THE GOVERNMENT OF CANADA
POUR LE GOUVERNEMENT DU CANADA

/s/ George P. Shultz

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

POUR LE GOUVERNEMENT DES ÉTATS-UNIS D'AMÉRIQUE

APPENDIX I

THE SECRETARY OF STATE

WASHINGTON

January 11, 1988

Dear Mr. Minister:

I refer to the Protocol Amending the Treaty on Extradition between the United States and Canada we signed today and have the honor to address to you the following.

The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters", is an extraditable offense under the United States - Canada Extradition Treaty.

The Right Honorable
Joe Clark, P.C., M.P.,
Secretary of State
For External Affairs of
Canada, Ottawa.

Where a person has been charged with or convicted of such an offense in Canada and is found within the jurisdiction of the United States, the United States agrees, upon request, to commence extradition proceedings against such a person pursuant to the Treaty in order that the person may be returned to Canada.

The United States will use its best efforts to honor Canadian requests for testimony, information, or other assistance pertaining to such abductions.

Canada and the United States agree to cooperate to deter such transborder abductions. To assist in achieving that purpose, the United States will continue to exert its best efforts to inform those engaged in business as bail bondsmen or bounty hunters and other interested parties of the positions set forth in this exchange of letters.

Canada and the United States agree to consult promptly concerning any case of transborder abduction involving bounty hunters which might arise in the future. The purpose of such consultations shall be to address matters relating to any such case, including any request by the Government of Canada for the return of the person so abducted. In the event of return, the Governments agree to co-operate to have the abducted person escorted to Canada and taken into custody at the border, pursuant to a request for provisional arrest, pending the outcome of extradition proceedings. For the purpose of these consultations, the principal law enforcement contact for the United States will be the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

I have the honor to propose that this letter and your reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Sincerely yours,

/s/ George P. Shultz

THE RT. HON. JOE CLARK, P.C., M.P.
Secretary of State for External Affairs

Ottawa, January 11, 1988

JLA-0026

Dear Mr. Secretary:

I have the honour to acknowledge receipt of your letter of today's date concerning transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters". I accept your proposal that your letter and this reply constitute an Understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Yours sincerely,

/s/ Joe Clark

The Honourable George P. Shultz
Secretary of State of the
United States of America

Supreme Court, U.S.
FILED
SEP 8 1993
OFFICE OF THE CLERK

No. 93-241

In The

Supreme Court of the United States

October Term, 1993

RUTH JAFFE,

Petitioner,

vs.

HARDY M. SNOW, JR. and ACCREDITED SURETY & CASUALTY COMPANY, INC.,

Respondents.

Petition For Writ Of Certiorari To The District Court Of Appeal Of The State Of Florida, Fifth District

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Fifth District Court of Appeal of the State of Florida is reported at 610 So.2d 482 (5th DCA 1992), *cert. denied*, ___ So.2d ___ (Fla. 1993). The opinion of the Ninth Judicial Circuit, in and for Orange County, Florida, granting summary judgment to the respondents is set forth in Appendix 1.

STATUTORY PROVISION

The respondents submit that there are no constitutional provisions or treaties brought into question by the instant case so that this Court should summarily deny the petition for writ of certiorari and award damages and costs against the petitioner pursuant to Rule of the Supreme Court 42 and Federal Rule of Civil Procedure 11.

JURISDICTION

Although the petitioner is attempting to invoke the jurisdiction of this Court pursuant to 28 U.S.C., section 1257(a), by alleging that the state court decision violates the extradition treaty with Canada, such is in fact a falsity as the crimes committed by Mr. Jaffe were not extraditable offenses.

COUNTERSTATEMENT OF THE FACTS

The actual facts of the instant case, rather than the fanciful imagination and wishful thinking of the facts set

forth in the Petition for Writ of Certiorari, unequivocally show that the instant case is not worthy of this Court's consideration. The case does not involve a federal question that would invoke the jurisdiction of this Court. In order for a correct determination, however, the respondents set forth the following statement of the facts. The following facts are the facts as found by the trial court and affirmed by the Fifth District Court of Appeal[1]:

> For the purpose of stating the undisputed material facts in this judgment, this court has relied upon portions of plaintiffs complaint, motion, supporting memorandum, appendices and facts appearing in three reported appellate opinions: *Jaffe v. State*, 438 So.2d 72 (Fla. 5th DCA 1983) ("*Jaffe I*"); *Jaffe v. Sanders*, 463 So.2d 318 (Fla. 5th DCA 1985 ("Jaffe II"); and *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).
>
> The material undisputed facts necessary for the disposition of the cross motions are as follows: In 1980, Sidney L. Jaffe ("Mr. Jaffe"), *a U.S. Citizen*, was charged in the Circuit Court of Putnam County, Florida, with 28 counts of violations of the "Florida Uniform Land Sales Practices Law," section 498.033(3), Florida Statutes (1979). A violation of this statute is a felony crime. After his arrest, Mr. Jaffe posted a $137,500.00 bail bond written by Accredited in order to secure his release from jail, and immediately went to Canada *where he and Mrs. Jaffe took up residence*. On the day he was scheduled for trial, Mr. Jaffe failed to appear. A motion for continuance filed by his attorneys was denied, a

---

[1] All facts set forth in the instant response were facts in the record on appeal before the Fifth District Court of Appeal.

warrant was issued for his arrest, and Accredited's bail bond was forfeited. The prosecuting attorney then filed a criminal charge of Failure to Appear, section 843.15(1)(a), Florida Statutes (1979). A violation of this statute is a felony crime. The prosecuting attorney subsequently made two applications to the Florida Governor seeking to extradite Mr. Jaffe from Canada, both of which applications were denied. The record does not show the basis for the denials. Mr. Jaffe remained in Canada and "exhibited a determination to remain there in violation of his undertaking to return to Florida to answer the charges." *Kear* at 181,2.

Snow and Accredited then hired two professional bail recovery agents, Johnsen and Kear, to go to Canada, apprehend Mr. Jaffe and surrender him to the Putnam County Sheriff, which they did. Mr. Jaffe was tried, convicted, and sentenced on all 28 counts of Unlawful Land Sales Practices; however, his convictions and sentences were later reversed. His conviction and sentence for Failure to Appear was affirmed. (Jaffe 1). Contrary to plaintiff's assertion, the Unlawful Land Sales Practices charges were not "unfounded." As the district court of appeal made clear in Jaffe II, the reversals were not based upon insufficient evidence but rather upon the legal insufficiency of the charging document.

Immediately upon his release from imprisonment, Mr. Jaffe returned to Canada. In 1985, Mr. Jaffe and Mrs. Jaffe brought suit in the Supreme Court of Ontario, Canada, against Snow and Accredited and other defendants seeking money damages for Mr. Jaffe's tortious

> abduction. Snow and Accredited appeared in the action through Canadian counsel, and after their motions to dismiss based on grounds of want of personal jurisdiction and form non conveniens were denied, declined to further defend the action. On November 22, 1990, the Canadian court entered a separate judgment in favor of Mrs. Jaffe only against Snow and Accredited awarding her general damages in the amount of $25,000 Canadian dollars; special damages in the amount of $903,481.47 U.S. dollars and $88,089.33 U.S. dollars and $62,458.74 Canadian dollars, the total amount to bear interest at the rate of 14% per annum.

(Footnotes omitted) (emphasis added[2]) (Appendix 1).

The court then turned to the law in which he concluded that there were no treaties or statutes, state or federal, which compelled the courts of Florida to recognize foreign nation judgments, nor did the full faith and credit clause of the United States Constitution require it. *See also, Jaffe v. Snow,* 610 So.2d 482 (Fla. 5th DCA 1992).

> Rather, recognition or non-recognition of such judgments in this state depends upon Florida common law principles of judicial comity. *Warren v. Warren,* 75 So. 35 (Fla. 1917); *Parker v. Parker,* 21 So.2d 141 (Fla. 1945); *Ogden v. Ogden,* 33 So.2d 871 (Fla. 1947); *Pawley v. Pawley,* 46 So.2d 414 (Fla. 1950).

The court next cited to the Florida supreme court decision in *Bechwith v. Bailey,* 161 So.2d 577, 581 (Fla.

---

[2] A Canadian has also found that Mr. Jaffe was a United States citizen when the offenses occurred and when Mr. Jaffe jumped bond.

1935). wherein the court, citing to the leading case from this Court, *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895) recognized that

> . . . comity . . . (in the legal sense) is neither a matter of absolute obligation or of mere courtesy and goodwill. It is . . . the recognition which one nation or state allows within its territory to the judicial acts of another nation or state, having due regard to both international duty and convenience, *and to the rights of its own citizens*. . . .

(Emphasis added)

The trial court then continued its reasoning by declaring that under Florida common law, the doctrine of comity precluded recognition of a foreign nation judgment where "special reasons" exist, citing to *Hilton*, "a foreign nation judgment may be contrary to a state's public policy if it conflicts with the state's interest, is inconsistent with its laws and/or is repugnant to fundamental notions of what is decent, equitable and just in the forum state [cites omitted]." The Fifth District acknowledged that in Florida in the overwhelming number of cases, courts recognize and enforce the judgments of other nations. The court specifically noted that this was particularly true of countries having a system of jurisprudence which has developed from the same historical roots as our own, such as Canada. "However, no jurisdiction will give comity to the judgment of another nation that offends the jurisdiction's public policy and sense of moral justice [citing to Restatement (Second) of the Foreign Relations Law of the United States, section 482 (1987)]."

The Fifth District held that there were many public reasons why a Florida court would refuse to recognize and enforce the Canadian judgment.

The court then found that there were three different special reasons as to why the Canadian judgment should not be enforced against the defendants. First, the court declared that Canadian tort law under which Mr. and Mrs. Jaffe's causes of action were brought are different from Florida law. The trial court then cited to section 903.02 and 903.29, Florida statutes (1979) and *Register v. Benton*, 75 So.2d 187 (Fla. 1975), for the proposition that both under the common law and statutory law of Florida, a surety such as Accredited could arrest the principal within the state, both before and after the forfeiture of a bail bond. The Fifth District agreed.

Additionally, under Florida common law, the surety could delegate to another person the right to make the arrest. The court reasoned further that had the apprehension of Mr. Jaffe by defendants' bail recovery agents occurred within the territorial boundaries of Florida, Mr. and Mrs. Jaffe would have had no cause of action under the tort laws of the state. The court continued that of even more significance, the public policy of Florida as expressed through its decisional and statutory law expressly favors and sanctions the apprehension of a bail jumper within the state by a surety or his agent.

The second special reason given is that Mr. Jaffe's act of failing to appear in court was a breach of his contractual obligation to Accredited under the bail agreement and a crime against the State of Florida for which he was duly convicted. "It was his wrongful criminal act in

jumping bail which directly caused Snow and Accredited to commit the acts found to be tortious in Canada which formed the basis of Mr. and Mrs. Jaffe's Canadian action against them." Also important is the fact that Mr. Jaffe declared, in the bail agreement, that his residence was California and that he had lived there for three (3) years. Consequently, under Mr. Jaffe's own admission, he was *not* a citizen of Canada but, rather, an American citizen brought back to America for American justice.

The Fifth District found that Sidney Jaffe is a fugitive from justice in the eyes of the Florida courts, having "jumped bond" in this jurisdiction not once, but twice. "And, there are still criminal charges pending against him in this state from which he has fled rather than faced. Simply stated, 'a fugitive from justice is not entitled to call upon the resources of court for determination of his case.' *Garcia v. Metro-Dade Police Department*, 576 So.2d 751, 752 (Fla. 3d DCA 1992). *United States v. One Lot of U.S. Currency Totalling $506,537*, 628 F.Supp. 1473, 1475 (S.D. Fla. 1986). Stated another way, a fugitive from justice 'cannot eat his cake and have it too.' *United States v. Eng*, 951 F.2d 461, 462 (2d Cir. 1991)."

In summation, the trial court declared that if Jaffe had obtained and sought to enforce a Canadian judgment against defendants here, to allow it would not only be inconsistent with this state's interest but patently inequitable for equity says that "no one shall be permitted to take advantage of his own wrong, or found any claim upon his own inequity or profit from his own crime," citing to *Ashwood v. Patterson*, 49 So.2d 848, 850 (Fla. 1951).

The Fifth District, on this issue, held as follows:

> Finally, Florida has a well-established public policy that our courts will not permit nor tolerate a person to benefit from his own wrongful act. In this case, Sidney Jaffe breached his contract or bond given to Accredited and accepted by the Florida court that he would not leave his California residence without Accredited's permission, and that he would return promptly to face the criminal charges brought against him. *See Reese v. United States*, 76 U.S. 13, 19 L.Ed. 541, 9 Wall. 13 (1869). He failed to do so. Although his eventual forceful return by Accredited was wrongful in Canada's eyes, he, too, was at fault for not honoring his bond. Two wrongs do not make a rights [sic], and neither wrongdoer should profit. *McMichael v. McMichael*, 158 Fla. 413, 28 So.2d 692 (1947).

(Footnote omitted)

The Fifth District disposed of Ruth Jaffe's argument that she should not be placed in her husband's shoes for purposes of recognition and enforcement of her judgment as follows:

> Ruth Jaffe argues she should not be placed in her husband's shoes for purposes of recognition and enforcement of her judgment. However, the nature of her cause of action is derivative and it was necessarily born out of Sidney Jaffe's tort suit for wrongful kidnapping. She was not kidnapped. Sidney was. Any loss of consortium on her part is deemed to be a derivative cause of action in Florida.

(Footnote omitted). In her state court appellate brief, Ruth Jaffe admitted that her damages were those caused

by the kidnapping of her husband by Snow and Accredited.

The trial court declared that it was holding the way it did because of the peculiar facts and circumstances of this case in that it fell within those very few exceptions where an American state court should decline to enforce a foreign nation's judgment. (R. 109). The reason no one case is authority for the reversing of another case is precisely because of what the trial court ruled, *i.e.*, that peculiar facts and circumstances of each case are what are applicable and that this one was so bizarre and unusual that it fell within one of those very few exceptions wherein the trial court should decline to enforce this particular foreign nation judgment. The Fifth District upheld the trial court on the grounds set forth as well as on the Federal fugitive from justice doctrine: "Appellant, on the one hand, wields a sword against our judicial system by escaping criminal prosecution. On the other hand, appellant attempts to shield himself, with the protection of his rights in the civil courts."

Additional facts that were before the state courts are also necessary in order for this Court to comprehend just how frivolous the instant petition is and for a correct determination as to where the equities lie in the instant case in order to invoke the principle of comity and the jurisdiction of this Court.

The following facts are necessary in order to show how Mr. Jaffe's actions have constituted an abuse of the judicial systems in both state and federal courts. Although the instant lawsuit involved a request for the enforcement of a foreign money judgment in favor of

Mrs. Sydney Jaffe, pursuant to well-established Florida law, Mrs. Jaffe has no cause of action against these defendants, because she only has a loss of consortium claim, which is derivative of Mr. Jaffe's claim. Mrs. Jaffe has acknowledged that she only has a loss of consortium claim as evidenced by her State of Claim attached as Appendix 4. In other words, if Mr. Jaffe has no legally enforceable claim against these defendants, then Mrs. Jaffe likewise has no legally enforceable claim. Therefore, a complete history of the illegal, unethical, and contemptuous actions of Mr. Jaffe must be set forth in their entirety.

Even assuming *arguendo* that Mrs. Jaffe had a valid claim against these defendants, which the defendants steadfastly maintain she does not, it would be against public policy to enforce the money judgment simply because of the numerous and sundry times Mr. Jaffe has abused the judicial system. The additional fact that he is still a fugitive from the state of Florida and, therefore, cannot return to enforce a judgment in his own name buttresses the respondents' position that this Court still should not enforce the foreign money judgment even if Mrs. Jaffe had a valid claim.

The genesis of this action occurred in 1972 when Continental Southeast Land Corporation bought a large tract of Florida land, subdivided it into more than twenty-eight hundred lots, and began selling the lots to individuals on installment contracts payable to Continental. At the same time, Continental was borrowing from individual investors. *Jaffe v. Grant*, 793 F.2d 1182, 1184 (11th Cir. 1986). Sydney Jaffe was vice-president of Continental. Through a series of transactions in 1976 and 1977,

Continental's interest in the remaining land and the vendee accounts were transferred to Meadow Valley Ranchos, Inc., Ruby Mountain Construction & Development Corp., and Atlantic Commercial Development Corp., (collectively, "The Corporations"). Sydney Jaffe was president of each corporation. Shortly thereafter, Continental defaulted on payments to its investors. The investors responded by filing suit in the Circuit Court of Putnam County, Florida, against Continental and The Corporations to set aside the transfers of land and the vendee contracts as fraudulent and to appoint a receiver for Continental. *Barbara Raymond, et al. v. Continental Southeast Land Corp.*, No. 78-416.

In June, 1979, Jaffe caused Continental to file a Chapter XI petition under the Bankruptcy Act. *Jaffe v. Grant, supra*, 793 F.2d at 1184. In January, 1980, the bankruptcy court adjudicated Continental bankrupt and appointed Charles Grant as trustee. After the bankruptcy court lifted the statutory automatic stay, the state court in the *Raymond* case substituted the trustee grant for Continental and realigned him as a plaintiff.

In March, 1981, the state court entered a final default judgment setting aside the transfers, holding The Corporations liable and was ordered to return the sums collected from the contract vendees and ordering an accounting. The Corporations appealed the state Court's March, 1981, order. In the interim, they refused to make the accounting and were held in contempt by the trial court. Note that this is the first instance of contempt.

Because of their continuing contempt, the appellate court dismissed The Corporations' appeal of the state

Court's March, 1981, order. *Atlantic Commercial Development Corp. v. Raymond*, No. 81-560 (Fla. 5th DCA Sept. 10, 1981). Note that this is the second occasion that prompted Jaffe being held in contempt.

In August of 1980 when Jaffe was arrested in Florida and charged with twenty-eight (28) counts of unlawful land sales practices, he obtained bail in the amount of $137,500 from Accredited Surety & Casualty Company and was released from custody. He then returned to his home in Toronto, Ontario, Canada. Jaffe did have a home in Canada but did not become a citizen until after he had become a fugitive from the State of Florida. Mr. Jaffe did not become a citizen of Canada until 1981. Mr. Jaffe had claimed three (3) years of residence in San Francisco on the bail bond application with Accredited.

Jaffe failed to appear for his pre-trial conference in his criminal case and the judge issued a warrant for his arrest. On May 18, 1981, his case was called for trial and again Jaffe failed to appear. A second arrest warrant was issued. The judge also ordered that the bond be estreated and directed the State attorney to immediately commence extradition proceedings to procure Jaffe's return from Canada. The State Attorney submitted two applications for extradition to the Governor of Florida, both of which were disapproved as to form by the Attorney General of Florida. The reason they were disapproved is that the crimes were not extraditable.

On May 15, 1981, the eve of his criminal trial, Jaffe and The Corporations filed an action in the United States District Court for the Middle District of Florida charging that trustee Grant and others had conspired to violate

their civil rights and sought to restrain the state criminal case. Trustee Grant responded with a counterclaim seeking enforcement of the *Raymond* judgment for an accounting against Jaffe individually, as well as against The Corporations on the ground that The Corporations were merely his alter egos.

During the course of these proceedings, Jaffe began his **repeated** actions of failing to appear at scheduled depositions. Trustee Grant moved for sanctions for Jaffe's failure to appear at scheduled depositions, and the District Court granted the motion and awarded attorney fees. *Jaffe v. Grant, supra,* 793 F.2d at 1185. Note that this is the third occasion of contempt. When the attorney fees were not paid as ordered, Trustee Grant filed a renewed motion for sanctions, resulting in an additional award of fees incurred in connection with Grant's seeking Compliance with the first order. Note that this is the fourth occasion of contempt.

During this time, *Jaffe, et al.* had also failed to timely comply with the court's order directing them to respond to the trustee's interrogatories and request for production. Jaffe, *et al.* did respond four days late, but in an incomplete and evasive manner, refusing to answer certain interrogatories and to produce certain documents. The court entered an order compelling them to produce a document and answer to interrogatories. Their responses were again non-responsive, evasive and incomplete. Again Grant moved for sanctions, this time asking that Jaffe, *et al.'s* answer to the counterclaim be stricken. The court granted the trustee's motion for sanctions "in light of [plaintiffs'] *flagrant and continued failure* to comply with discovery requests and court orders." (emphasis added).

Note that this is the fifth occasion of contempt. When Jaffe, *et al.* took no action to cure their failure to comply with the court's orders, the District Court struck Jaffe, *et al.'s* answers to the trustee's counterclaim and enter judgment by default. *Id.* Note that these are the sixth and seventh occasions of contempt.

In the *Raymond* action, Grant served a request for admission that The Corporations had received more than three million dollars from contract vendees at Continental. Again, The Corporations evaded answering and Grant moved to strike their answers to discovery requests as a sanction. The state court struck The Corporations' responses because of their evasive nature and deemed the request with respect to the three million dollar figure admitted. Note once again that this is the eighth occasion of contempt. On appeal of that ruling the Florida appellate court affirmed. *Ruby Mountain Construction & Development Corp. v. Raymond*, 409 So.2d 525 (Fla. 5th DCA 1982).

The state trial court then granted the trustee's motion for summary judgment and entered a supplemental final judgment in the amount of three million dollars plus interest. The Corporations appealed, but their appeal was dismissed as frivolous, with attorneys' fees for a bad faith appeal being assessed. Note that this is the ninth instance of contempt. *Atlantic Commercial Development Corp. v. Raymond*, No. 82-724 (Fla. 5th DCA June 30, 1982). Grant now has a five million dollar judgment in its favor against Jaffe in Canada.

Jaffe, however, did not seem to learn his lesson about the consequences of his failure to cooperate in discovery.

In the second lawsuit filed by Sydney L. Jaffe and Ruth M. Jaffe, defendant Accredited Surety & Casualty Company, Inc., moved for sanctions pursuant to Rule 37(d) Federal Rule of Civil Procedure on August 19, 1986. Note that this is the tenth occasion of contempt. Typical of the plaintiff, he moved to dismiss the action without prejudice pursuant to Rule 41(a)(2), Federal Rule of Civil Procedure on August 29, 1986. No. 85-1128-CIV-J-16 (United States District Court, Middle District of Florida, Jacksonville Division). (Appendix 3). Although the district court concluded that the actions should be dismissed, the court declared that it would be inclined to grant Accredited's request that the cause be dismissed with prejudice for the plaintiffs' failure to cooperate in discovery. *Id.* It should be noted that "Plaintiffs" is in the plural and includes both Sydney L. Jaffe *and* the instant plaintiff, Ruth M. Jaffe. The order of the court entered on November 5, 1986, specifically and unequivocally declared:

> The court would be inclined to grant said motion and dismiss this action with prejudice in light of plaintiff's flouting of the authority and jurisdiction of this court and the Federal Rules of Civil Procedure. *See, also, Jaffe v. Grant*, 793 F.2d 1182, 1189-90 (11th Cir. 1986).

(Appendix 3). Plaintiffs unjustifiably failed to appear at depositions noticed by Accredited and scheduled to take place in Jacksonville, Florida. *See*, Rule 3.04(c), *Local Rules of the United States District Court for the Middle District of Florida*. Further, plaintiffs defied the court's order to show cause entered on October 3, 1986, and failed to appear at the aforementioned hearing. In spite of plaintiff's conduct, however, the court concluded that it was divested

of jurisdiction to entertain Accredited's motion for sanctions when plaintiffs filed on August 29, 1986, their notice of dismissal pursuant to *Rule 41(a)(1), Fed. R. Civ. P.*, as to defendants, Hank M. Snow, Timm Johnsen, Daniel J. Kear, and Joseph Miller. This is the eleventh instance of contempt. *Id.*

The state courts based their decisions on Mr. Jaffe's conduct and that is the focus this Court should take. Whether or not Kear and Johnsen were criminally liable for the kidnapping of Mr. Jaffe has already been tried and determined and is not relevant in these proceedings except as background. Mr. Jaffe's conduct is what is at issue here since a money judgment awarded his wife for loss of consortium is sought to be enforced on grounds of equity and justness.

But now back to the facts. The District Court for the Middle District of Florida in Case No. 84-3747, the Honorable John H. Moore, II, made statement from the bench during a status conference. In particular, the court referred to Jaffe, *et al.'s* litigation tactics and their incessant changing of attorneys. Jaffe sought to recuse Judge Moore based on those statements. The Eleventh Circuit, however, held that the trial court did not abuse its discretion in denying Jaffe's recusal motion as the court's statements reflected its perception of the underlying facts of the case, Jaffe, *et al.'s* litigation tactics, and their incessant changing of attorneys. The Eleventh Circuit ruled that the district court's statements were based on knowledge the court had gained in a purely judicial context by presiding over this action and the habeas corpus proceeding filed by the Canadian government. *Jaffe v. Grant, supra,* 793 F.2d at 1189-90.

Jaffe had also alleged as an error in *Jaffe v. Grant* that the sanctions imposed for Jaffe, *et al.'s* refusal to comply with discovery orders were Draconian sanctions and unwarranted. The District Court had entered an order striking their answer and defenses to the trustees' counterclaim. Note that this is occasion for contempt number twelve.

As declared by the Eleventh Circuit:

> *Jaffe, et al.* proffered a laundry list of reasons why the sanctions imposed below are too harsh. Their first argument, perhaps a nadir of this frivolous collection, is that the deterrent value of this sanction could have been substantially achieved by use of one less drastic. At oral argument, counsel suggested that an award of costs might have been appropriate. However, such a suggestion flies in the fact of the record as well as the facts found by the District Court:
>
> > It should be further noted that sanctions in the form of attorney's fees have been imposed on plaintiffs during the course of this litigation. On January 25, 1982, attorney's fees were taxed against plaintiffs for their unjustified failure to attend scheduled depositions. Plaintiffs did not timely pay defendants the fees imposed by the court as sanctions and, therefore, further sanctions were imposed against plaintiff on February 16, 1982.
>
> It is abundantly clear to the court that the lesser sanctions contemplated by Rule 37, Fed.R.Civ.P., are not effective in compelling plaintiffs to conduct discovery in a timely and responsive manner.

Id.

In the same case, typical of an "innocent" criminal, Jaffe sought to place the blame for their long-standing refusal to comply with discovery on one of their former attorneys. Jaffe, *et al.* also argued that their failure to comply with the court's orders were due to inability. Purportedly, Jaffe was prevented from complying by his health problems and, later, incarceration at various correctional institutions. "However, neither Jaffe's alleged problems can excuse repeated non-responsive, evasive and incomplete answers to interrogatories and request for admissions. For example, Jaffe's alleged problems with his health, incarceration and attorneys cannot excuse the intentional misconduct of producing documents with portions torn off." *Id.* at 1190.

While Jaffe was incarcerated for his conviction for failure to appear at trial, he was indicted on one count of organized fraud, stemming from the same land sale activities. He was released from custody in October, 1983 and allowed to post bond on the fraud charge. He returned to Canada once again and once again failed to appear for trial on this charge. This is the only offense that comes within the extradition proceeding between Canada and the U.S. and the instant respondents were not involved in the posting of a bond for that offense. Consequently, the treaty has no application to the instant proceeding.

REASONS FOR DENYING THE PETITION

I. The Florida judgment below does not conflict with any international agreement between the United States and Canada nor any federal interest that would require the Florida court grant comity by enforcing the petitioner's judgment.

As made clear in the Counterstatement of the Facts, Mr. Jaffe was a United States citizen when brought back to the United States to face the criminal charges brought against him. The Canadian courts have also declared that to be a fact. (Appendix 4, at App. 6). Also made abundantly clear is the fact that the violations of the Florida Uniform Land Sales Practices Law committed by Mr. Jaffe are not extraditable offenses under the treaty with Canada. Both state courts found accordingly. The fraud count against Mr. Jaffe was the subject of a subsequent indictment against Mr. Jaffe. Although bonded out on the fraud count by another bonding company, for which Mr. Jaffe also jumped bond, whether or not the fraud count is extraditable is totally irrelevant to these proceedings or any other proceedings to which the respondents are parties. Mrs. Jaffe attempted to convince the Florida state courts of her factually inaccurate statements in order to commit a fraud on those courts but to no avail. Her fraudulent attempts should likewise be to no avail in this Court. Consequently, the *only* principle of law relevant to these proceedings is the principle of comity.

A foreign nation judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the state where enforcement is sought. *Ackermann v. Levine*, 788 F.2d 831, 841 (2d Cir. 1986). In the classic formulation,

a judgment that tends clearly to undermine the public interest is against public policy. *Id.* at 841. *Accord, Tahan v. Hodgeson,* 662 F.2d 862, 864 (D.C. Cir. 1981); *Overseas Inns S.A.P.A. v. United States,* 465 F.Supp. 968, 972 (N.D. Tex. 1988) (it is a settled principle of comity that deference need not be given to foreign judgments in face of significant countervailing public policy reasons); *Norkan Lodge Co., Ltd. v. Gillum,* 587 F.Supp. 1457, 1461 (N.D. Tex 1984). In *Hilton v. Guyot, supra,* the court defined the doctrine of comity as follows:

> Comity in the legal sense, is neither a matter of absolute obligation on the one hand nor of mere courtesy and good will upon the other, but is within the recognition which one nation allows within its territory to the legislation, execution or judicial acts of another nation, having due regard to both international duty and convenience, and to *the rights of its own citizens or of other persons who are under the protection of its laws.*

159 U.S. at 163-64, 16 S.Ct. at 143, 40 L.Ed. 95 (emphasis added). " 'Comity' summarizes in a brief word a complex and elusive concept . . . the degree of difference that a domestic form must pay to the act of a foreign government not otherwise binding on the forum." *Laker Airways, Ltd. v. Sabena, World Airlines,* 731 F.2d 909, 937 (D.C. Cir. 1984). As declared by the court in *Overseas Inns,* the search for finding precedent in comity cases is limited by the fact-oriented nature of the cases decided. *Overseas S.A.P.A. v. United States, supra,* 685 F.Supp. 971. Consequently, the facts of each particular case are of paramount importance.

Based on the above holdings and clear expressions by this Court it defies logic for the petitioner to argue that this Court or any state court was either obligated to enforce a Canadian judgment or that there are overriding federal interests that require the Florida courts to grant comity by enforcing the petitioners' judgment.

The courts below very carefully limited their rulings in the case to the facts presented. The trial court began its closing by declaring that "it should be stated that nothing in this judgment should be construed as condoning the acts of Snow and Accredited and their agents which caused the events in Canada. Now that the *Kear* case is on the books, the criminal laws of Canada and the extradition treaty between our two countries should provide a sufficient deterrent against that type of activity in the future." Any argument advanced by Jaffe that this case has wide-reaching implications is worthless in light of the state courts' disclaimers.

The respondents submit that it is of paramount importance for this Court to remember that none of the offenses for which the respondents bonded Mr. Jaffe out of jail are extraditable offenses listed in the treaty between the United States and Canada. Although fraud is an extraditable offense under the treaty, Mr. Jaffe was not charged with fraud until subsequent to Mr. Jaffe's return to the United States by Kear and Johnsen. Mr. Jaffe subsequently jumped bond when he was bonded out for the fraud offenses but that is a different story. The fact remains that the charges for which Mr. Jaffe was charged and for which the respondents posted his bond were not extraditable offenses under the treaty between the United States and Canada. Therefore, the respondents are

requesting Rule 11 sanctions be imposed against the petitioner and her attorneys because this fact alone makes the entire petition frivolous. That fact should have been known by the petitioner's attorneys as it is a fact published in an Eleventh Circuit opinion. *Jaffe v. Grant*, 793 F.2d 1182 (11th Cir. 1986). *See also, Jaffe v. Sanders*, 463 So.2d 318 (Fla. 5th DCA 1985).

Rather than the Fifth District's "opinion offer[ing] a safe haven from civil liability for those engaged in transport or kidnappings," the opinion tells citizens of the United States that they may not commit crimes in the United States, flee to a foreign country, take up residency, and attempt to come back to the state wherein the crimes occurred for which that citizen never paid his dues to society and expect to reap the benefits from his own wrongdoing. Surely such a message is in keeping with this Court's notion of what is right and just. Although the Canadian government may have been upset when the initial taking of Mr. Jaffe occurred, a recent Canadian court decision states Canada's position now that all the facts are known:

> We think the appeal from the sentences imposed by the trial judge should succeed. The trial judge rightly considered the offence to be a grave affront to the sovereignty of this country. Although it is not excused, the gravity of the affront is mitigated by the circumstances of the offence. In consideration of the surety putting up $137,000 U.S. to secure his freedom from jail and after being told by the surety that if he did not appear in court he would come and get him anywhere, Jaffe agreed in writing that the surety would have the right 'to forthwith apprehend,

> arrest and surrender' him. In violation to his obligations to the court which had released him from jail and to the prejudice of the surety's $137,000, Jaffe, *who was then an American citizen,* absconded and fled to this country where he managed to obtain Canadian citizenship. There is nothing favorable that can be said about his conduct.

(Appendix 4, at App. 6) (emphasis added).

A foreign judgment under comity principles is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the state where the enforcement is sought. A judgment that tends clearly to undermine the public interest is against public policy. Applying those principles to the instant case, it defies all that is right and just to even give credence to Mrs. Jaffe's claim, much less even consider enforcing it.

II. The Florida judgment below does not violate the petitioner's rights under the Fourteenth Amendment of the Constitution.

Mrs. Jaffe's claims against the respondents were based solely on the alleged kidnapping of Mr. Jaffe as made abundantly clear in her statement of claim filed against the respondents in the Canadian court. Mrs. Jaffe has not, as well as she cannot, claim any actions of the respondents aimed directly at her; she has only alleged that she suffered damages as a result of the actions by the respondents against Mr. Jaffe. Consequently, her claims against the respondents are derivative of Mr. Jaffe's.

The issue of whether or not Mrs. Jaffe's claim is derivative of Mr. Jaffe's is a matter of state law. Under well-established Florida law, Mrs. Ruth Jaffe's claim for loss of consortium is strictly and solely derivative of Mr. Jaffe's. *Davis v. Afbll*, 328 So.2d 204 (Fla. 1st DCA 1976); *Gates v. Foley*, 247 So.2d 40 (Fla. 1971). As declared by the *Davis* court, quoting to the *Gates'* opinion:

> The derivative cause of action for loss of consortium is subordinate to the primary action, and being so, that a judicial determination in the primary action as to the question of liability is binding upon the subordinate action for loss of consortium.

As Mr. Jaffe, under public policy reasons, would be precluded from having a foreign judgment enforced in his name, likewise Mrs. Jaffe is foreclosed by those same public policy reasons. Consequently, there is no federal question involved in the instant case. The cases relied on by the petitioner in her petition give absolutely no application to the instant case.

Mrs. Jaffe was not denied access to the courts. She had and took advantage of access to the courts but is simply complaining because she did not receive the decision she sought. One does not have a fundamental and/or constitutional right to a decision in their favor.

She additionally was not deprived a fundamental right – that of marital association – because of the alleged kidnapping of Mr. Jaffe. Mr. Jaffe is the one who deprived Mrs. Jaffe of marital association by committing crimes in the state of Florida and being jailed therefore. If Mr. Jaffe had stayed in the state of Florida the way he contracted

with respondents that he would, he would be incarcerated and would consequently have deprived Mrs. Jaffe of marital association.

Further, the respondents submit that it is ludicrous to suggest that Mrs. Jaffe was deprived of her liberty and property interests without due process of law. The mere fact that a person is unsuccessful in court in a matter involving life, liberty, or property does not show that there was a violation of the due process guaranty. *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 58 S.Ct. 185, 82 L.Ed. 268 (1937). The Fourteenth Amendment does not raise a federal question in every case to test the justice of a decision. *New York & N.E.R. Co. v. Bristol,* 151 U.S. 556, 14 S.Ct. 437, 38 L.Ed. 269 (1893). Mrs. Jaffe has been fully heard in the regular course of judicial proceedings. The extent to which a decision is erroneous or the fact that it is contrary to previous decisions has been said to be immaterial. *Patterson v. Colorado,* 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 879 (1907). Of course, the state court's decision is neither erroneous nor contrary to previous decisions.

The respondents submit that Mrs. Jaffe did not suffer a violation of any of her individual rights. As set forth in her statement of claim, Mrs. Jaffe alleged that her damages were caused by Mr. Jaffe's wrongful imprisonment. (Appendix 3, at p.24). Of course, Mr. Jaffe was not wrongfully imprisoned. The cases relied on by the petitioner have no application whatsoever to the case before this Court. Mrs. Jaffe was not denied the right to marry. *Zablocki v. Radhile,* 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Nor were her rights as a parent completely and irrevocably severed. *Santosky v. Kramer,* 455 U.S. 743,

102 S.Ct. 1388, 71 L.Ed.2d 599 (1981). Mrs. Jaffe certainly was not convicted of a crime of having her son and grandson plus second grandson who is the cousin of first grandson living with her. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

None of Mrs. Jaffe's rights were violated as she sought damages that were exclusively and solely derivative of Mr. Jaffe's. Mrs. Jaffe set forth claims as follows:

> 62. The plaintiff Ruth Jaffe pleads that she has expended considerable time and effort to redress the wrongful actions of the defendants and in the administration of the affairs of the plaintiff Sidney Jaffe during the period of his wrongful imprisonment, and incurred expense in travel to and from Florida and otherwise to visit and to obtain the release of the plaintiff Sidney Jaffe from his wrongful imprisonment.
>
> 63. The plaintiff Ruth Jaffe further pleads that by reason of the foregoing she has suffered and continues to suffer serious damage, by reason of her mental and physical suffering, loss of income, the aforesaid expenditures, and the loss of guidance, care and companionship of the plaintiff Sidney Jaffe during the period of his imprisonment. The plaintiff Ruth Jaffe pleads that she has suffered and continues to suffer this damage in the City of Toronto.

Id. (Appendix 5)

For Mrs. Jaffe to now come before this Court and allege that her claims are not derivative of Mr. Jaffe's is as fraudulent as the other ground given for enforcing Mrs. Jaffe's judgment. Such should not be tolerated by this Court. Any monies that Mrs. Jaffe expended in traveling

to and from Florida to visit and obtain the relief of the plaintiff Sidney Jaffe should have been expended to visit him while in jail where Mr. Jaffe should be. Those damages relate solely to the alleged wrongs committed by the respondents to Mr. Jaffe, not Mrs. Jaffe.

The further claims as to damages are for loss of consortium which likewise is derivative of Mr. Jaffe's alleged kidnapping. The Fifth District summarized Mrs. Jaffe's loss of consortium claim as follows:

> The fugitive from justice doctrine bars any claim or defense that is solely derivative of the fugitive's claim. *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane*, 868 F.2d at 1217 n.5; *United States v. $129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985), *cert. denied*, 474 U.S. 1086, 106 S.Ct. 868, 88 L.Ed.2d 901 (1986). In *$129,374 in United States Currency*, Gerald Geiger had been appointed conservator of his brother Lewis' estate and attempted to intervene in forfeiture proceedings involving property belonging to Lewis, who was a fugitive on the related criminal charges. The court held that if Lewis, as a fugitive from justice, were deprived of presenting any claim or defense in the action as a result of his fugitive status, the conservator of his estate must likewise suffer the same consequences when he seeks to advance the same claim or defense.
>
> Here, Jaffe fled the jurisdiction of Florida in his land fraud case and did not appear at his second fraud trial. The fugitive from justice doctrine would bar any of Jaffe's claims for damages from his return to Florida by his bondsmen. Mrs. Jaffe's claims are derivative of

her husband's and likewise are barred under the fugitive from justice doctrine.

Further, if Ruth Jaffe is allowed to recover the expenses and claims she sought and obtained in the Canadian judgment, it would permit her to profit from a wrongdoer's activity. The expenses of retaining counsel to defend Sidney in Florida and her visitation in Florida should *rightfully* have been spent, because Sidney should rightfully have returned to this jurisdiction to stand trial. To allow her to collect on any of these items as "damages" would be to reward the bondjumper. In addition, any loss of consortium on her part was in the eyes of the Florida courts a rightful loss, because Sidney should have *rightfully* been separated from her while he stood trial and served time in prison after his conviction. Her loss of consortium was thus the consequence of her husband's own wrong and she should not be allowed to benefit from it. *See Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951).

CONCLUSION

For the foregoing reasons the petition for writ of Certiorari should he denied and sanctions imposed. In Mrs. Jaffe's brief before the Fifth District Court of Appeal, she admitted that her damages were those caused by the kidnapping of her husband by Snow and Accredited.

Respectfully submitted,

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APPENDIX 1

IN THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI 91-1593

RUTH JAFFE,

Plaintiff,

vs.

HARDY M. SNOW, JR., and ACCREDITED SURETY & CASUALTY COMPANY, INC.,

Defendants.

_____/

FINAL SUMMARY JUDGMENT FOR DEFENDANTS

This is an action brought by Ruth Jaffe ("Mrs. Jaffe"), a Canadian resident, for recognition and enforcement of her Canadian money judgment against Hardy M. Snow, ("Snow") and Accredited Surety & Casualty Company, Inc. ("Accredited"), a citizen and resident of the State of Florida and a Florida corporation having its principal place of business in Orange County, Florida.

This case came on for hearing on June 24, 1991, on the parties' cross motions for summary judgment. The Court reviewed the pleadings, the Canadian judgment and complaint and the motions; listened carefully to the arguments of counsel; has read the legal memoranda furnished and studied many of the authorities cited herein, and has given the case careful consideration.

Under Florida law, a party may be granted a summary judgment if there is no genuine issue of material fact as demonstrated by the record made for the summary judgment hearing and such party is entitled to judgment as a matter of law on the undisputed material facts. Fla.R.Civ.P. 1.510(c); *Carpineta v. Shields*, 70 So.2d 573 (Fla. 1954). Since Florida courts have granted summary judgment enforcing foreign nation judgments, see e.g., *Willson v. Willson*, 55 So.2d 905 (Fla. 1952); *Mathor v. Lloyds Underwriters*, 174 So.2d 71 (Fla. 3rd DCA 1965); *Bullen v. Her Majesty's Govt. of the U.K.*, 553 So.2d 1344 (Fla. 4th DCA 1989), rev. den. 567 So.2d 434 (Fla. 1990), it follows that summary judgment can be granted refusing to enforce such a judgment in a proper case. Indeed, plaintiff states that "(a)ll the parties agree that the question of enforcement of Mrs. Jaffe's Canadian judgment is a matter of law for the Court." (plaintiff's supporting memorandum, p.2)

For the purpose of stating the undisputed material facts in this judgment, this Court has relied upon portions of plaintiff's complaint, motion, supporting memorandum, appendices and facts appearing in three reported appellate opinions: *Jaffe v. State*, 438 So.2d 72 (Fla. 5th DCA 1983) ("Jaffe I"); *Jaffe v. Sanders*, 463 So.2d 318 (Fla. 5th DCA 1985) ("Jaffe II"); and *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983).

The material undisputed facts necessary for the disposition of the cross motions are as follows. In 1980, Sidney L. Jaffe ("Mr. Jaffe"), a U.S. citizen, was charged in the Circuit Court of Putnam County, Florida, with 28 counts of violations of the "Florida Uniform Land Sales Practices Law", Section 498.033(3), Florida Statutes (1979). A violation of this statute is a felony crime. After

his arrest, Mr. Jaffe posted a $137,500.00 bail bond written by Accredited in order to secure his release from jail, and immediately went to Canada where he and Mrs. Jaffe took up residence. On the day he was scheduled for trial, Mr. Jaffe failed to appear. A motion for continuance filed by his attorneys was denied, a warrant was issued for his arrest, and Accredited's bail bond was forfeited.[1] The prosecuting attorney then filed a criminal charge of Failure to Appear, Section 843.15(1)(a), Fla. Statutes (1979). A violation of this statute is a felony crime. The prosecuting attorney subsequently made two applications to the Florida Governor seeking to extradite Mr. Jaffe from Canada, both of which applications were denied. The record does not show the basis for the denials.[2] Mr. Jaffe remained in Canada and "exhibited a determination to remain there in violation of his undertaking to return to Florida to answer the charges." *Kear* at 181,2.

Snow and Accredited then hired two professional bail recovery agents , Johnsen and Kear, to go to Canada, apprehend Mr. Jaffe and surrender him to the Putnam County Sheriff, which they did.[3] Mr. Jaffe was tried, convicted, and sentenced on all 28 counts of Unlawful Land Sales Practices; however, his convictions and sentences were later reversed. His conviction and sentence for Failure to Appear was affirmed. *Jaffe I*. Contrary to plaintiff's assertion, the Unlawful Land Sales Practices charges were not "unfounded". As the District Court of Appeal made clear in *Jaffe II*, the reversals were not based upon insufficient evidence but rather upon the legal insufficiency of the charging document.

Immediately upon his release from imprisonment, Mr. Jaffe returned to Canada. In 1985, Mr. Jaffe and Mrs.

Jaffe brought suit in the Supreme Court of Ontario, Canada, against Snow and Accredited and other defendants seeking money damages for Mr. Jaffe's tortious abduction.[4] Snow and Accredited appeared in the action through Canadian counsel, and after their motions to dismiss based on grounds of want of personal jurisdiction an forum non conveniens were denied, declined to further defend the action. On November 22, 1990, the Canadian court entered a separate judgment in favor of Mrs. Jaffe only[5] against Snow and Accredited awarding her general damages in the amount of $25,000 Canadian dollars; special damages in the amount of $903,481.47 U.S. dollars and $88,293.56 Canadian dollars; pre-judgment interest in the amount of $498,089.33 U.S. dollars and $62,458.74 Canadian dollars, the total amount to bear interest at the rate of 14% per annum.

Turning now to the law, this Court concludes that there are no treaties or statutes, state or federal, which compel the courts of Florida to recognize foreign nation judgments, nor does the full faith and credit clause of the United States Constitution require it. Rather, recognition or nonrecognition of such judgments in this state depends upon Florida common law principles of judicial comity. *Warren v. Warren* 75 So.35 (Fla. 1917); *Parker v. Parker*, 21 So.2d 141 (Fla. 1945); *Ogden v. Ogden*, 33 So.2d 871 (Fla. 1947); *Pawley v. Pawley* 46 So.2d 464 (Fla. 1950).

In *Beckwith v. Bailey*, 161 So.577,581 (Fla. 1935), the Florida Supreme Court, citing the leading United States Supreme Court case of *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct 139, 40 L.Ed. 95 (1895), recognized that ". . . comity . . . (in the legal sense) is neither a matter of absolute obligation or of mere courtesy and good will. It is . . . the

recognition which one nation or state allows within its territory to the . . . judicial acts of another nation or state, having due regard to both international duty and convenience, and to the rights of its own citizens. . . . "

In *Warren*, the Florida Supreme Court adopted the general statement of conditions for recognition enunciated in *Hilton*, which are that "(t)here has been full opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of law under which it is sitting, or fraud in procuring the judgment, *or any other special reason why the comity of this nation should not allow it full effect*. . . . " *Waren*, 75 So. at 44; *Hilton*, 159 U.S. at 202-03 (emphasis supplied).

Quoting with approval from several treatises, the *Hilton* court recognized the principles that " '(e)very nation must be the final judge for itself, not only of the nature and extent of the duty (to give effect to foreign nation judgments), but of the occasions on which its exercise may be justly demanded' ", 159 U.S. at 109; and that " '. . . the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable'." *Id.*

Defendants concede the authenticity of the Canadian judgment and compliance with due process conditions leading to its rendition. They do not claim prejudice or fraud. However, they raise several defenses, although inartfully, none of which have merit[6] save one – that Mrs. Jaffe's judgment should be refused recognition on public policy grounds.

Under Florida common law, the doctrine of comity precludes recognition of a foreign nation judgment where "special reasons" exist. *Hilton*. One of those special reasons is that such a judgment is contrary to the public policy of Florida. *Id.* A foreign nation judgment may be contrary to a state's public policy if it conflicts with the state's interests, is inconsistent with its laws and/or is repugnant to fundamental notions of what is decent, equitable and just in the forum state. *Id. See also Ackerman v. Levine*, 788 F.2d 830,841-2 (2d Cir. 1986) ("A judgment is unenforceable as against public policy to the extent that is it 'repugnant to fundamental notions as to what is decent and just in the State where enforcement is sought.' ") *Tahan v. Hodgson*, 662 F.2d 862,864 (D.C.Cir. 1981); Restatement 2d Conflict of Laws, Sec. 117, comment c (1971); Reese, Judgments Rendered Abroad, 50 Columbia L. Rev. 783,797 (1950) (". . . (o)ur courts should not be required to enforce a judgment based upon a cause of action which offends against our notions of what is decent and just, or which offends against our laws").

Two cases have been cited from time to time by courts and commentators as examples of the application of these principles. In *De Briemont v. Penniman*, 7 Fed. Cas. 309, No. 3, 715 (C.C.S.D.N.Y. 1873), a Federal Circuit Judge refused to enforce a French decree requiring a U.S.

citizen to support his adult French son-in-law. In *In re: Estate of Davis*, 219 N.Y.S.2d 533 (Sup. Ct. 1961), affirmed 227 N.Y.S.2d 894 (1962), the New York Court denied recognition to an Italian judgment which contravened a New York statute disallowing entry of judgments against persons who died during the litigation.

Canadian tort law under which Mr. and Mrs. Jaffe's causes of action were brought is different from Florida law. Both under the common law and statutory law of this state, a surety such as Accredited may arrest the principal within the state, both before and after the forfeiture of a bail bond. *Register v. Benton*, 75 So.2d 187 (Fla. 1975); Sections 903.02 and .29, Florida Statutes (1979). Under Florida common law, the surety may delegate to another person the right to make the arrest (but if the surety delegates a law enforcement officer, then the procedure set forth in Section 903.29 must be followed). *Register*. "One under bail is in the vicarious custody of his bondsman whose 'dominion is a continuance of the original imprisonment, and the principal may be apprehended by his bondsman even under extreme circumstances.' Taylor v. Taintor, 16 Wall 366 83 U.S. 366, 21 L.Ed. 2d 287. . . . " *Id.* at 188. Consequently, had the apprehension of Mr. Jaffe by defendants' bail recovery agents occurred within the territorial boundaries of Florida, Mr. and Mrs. Jaffe would have had no cause of action under the tort law of this state. Of even more significance, the public policy of Florida as expressed through its decisional and statutory law expressly favors and sanctions the apprehension of a bond jumper within the state by his surety or its agent.

Furthermore, Mr. Jaffe's act of failing to appear in court was a breach of his contractual obligation to Accredited under their bail agreement and a crime against the State of Florida for which he was duly convicted. It was his wrongful criminal act in jumping bail which directly caused Snow and Accredited to commit the acts found to be tortious in Canada which formed the basis of Mr. and Mrs. Jaffe's Canadian action against them. If Mr. Jaffe had obtained and sought to enforce a Canadian judgment against defendants here, to allow it would not only be inconsistent with this State's interests but patently inequitable, for Equity says that that [sic] "no one shall be permitted to take advantage of his own wrong, or found any claim upon his own inequity, or profit from his own crime." *Ashwood v. Patterson*, 49 So.2d 848, 850 (Fla.1951).

Finally, since under principles of comity public policy reasons would foreclose enforcement of any judgment Mr. Jaffee [sic] has obtained or might obtain in the Canadian action, it logically follows that the same is true of Mrs. Jaffe's judgment. This is so because the claim upon which it was based was intertwined with, solely derivative of and utterly dependent upon that of her husband. And if she were to collect all or a part of her judgment through the processes of this Court, he would stand to benefit, even if only indirectly.

In closing it should be stated that nothing in this judgment should be construed as condoning the acts of Snow and Accredited and their agents which caused the events in Canada. Now that the *Kear* case is on the books, the criminal laws of Canada and the extradition treaty between our two countries should provide a sufficient

deterrent against that type of activity in the future. This Court agrees with the suggestion of Judge Murnaghan in *Kear* that it might be profitable to pursue through diplomatic and political channels a system of cooperation between officials of our two countries for the return of all American bail jumpers. Finally, lest it be thought otherwise, this Court has the utmost respect for the nation of Canada, its laws, its jurists and its legal system, and only holds that because of the peculiar facts and circumstances of this case, it falls within those very few exceptions where an American state court should decline to enforce a foreign nation's judgment.

Accordingly, based upon all of the foregoing, it is **ORDERED** and **ADJUDGED** that:

1. Plaintiff's Motion for Summary Judgment is denied.

2. Defendants' Motion for Summary Judgment is granted, and Final Summary Judgment is hereby entered in favor of defendants Hardy M. Snow and Accredited Surety and Casualty Company, Inc. Plaintiff will take nothing by this action and go hence without day. Defendants shall recover their taxable costs, if any.

3. Both parties' motions for attorney's fees and other pending motions are denied.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida, this 26 day of July, 1991.

/s/ ROM W. POWELL
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies hereof have been furnished to James L. Simon, of Holland & Knight, Post Office Box 1526, Orlando, Florida, 32802, attorney for plaintiff, and Sharon Lee Stedman, of Rumberger, Kirk, Caldwell, Cabaniss, Burke & Weschler, Post Office Box 1873, Orlando, Florida, 32802, attorney for defendants, by United States Mail this 26 day of July, 1991.

/s/ Marilee A. DeLoy
Judicial Assistant

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[1] Accredited paid the $137,500 to Putnam County. Upon Mr. Jaffe's return to custody there, $37,500 was remitted to Accredited. Putnam County kept the remaining $100,000.

[2] Unlawful Land Sales Practices and Failure to Appear are not among the extraditable offenses listed in the treaty between our two countries. See Art. 2, Treaty on Extradition Between the United States of America and Canada (1971) and Annexed Schedule, para.s [sic] 1-30. Consequently, Canada would not have been obligated to surrender Mr. Jaffe on those charges even if formal extradition request had been made by the Florida Governor.

[3] The record does not reflect that the circumstances of Mr. Jaffe's apprehension by the bail recovery agents were aggravated. Using a ruse, the agents took Mr. Jaffe into their custody, placed him in mechanical restraints, transported him by automobile across the border into the United States, allowed him to telephone his son, then transported him by airplane to Florida and after landing, took him by automobile to the Putnam County Jail. See *Kear*.

[4] In paragraphs 62 and 63 of her Complaint in the Canadian action, Mrs. Jaffe alleged the following damage elements: loss of consortium; mental and physical suffering; loss of income; expenditures of time and effort in an "effort to redress

the wrongful actions of the defendants" and in the administration of her husband's affairs; expenses in visiting and obtaining her husband's release from his wrongful imprisonment.

[5] Curiously, the record does not reflect that a judgment was entered in favor of Mr. Jaffe.

[6] Defendants' "two dismissal" defense cannot be maintained for the simple reason that Mrs. Jaffe was not a co-plaintiff with Mr. Jaffe in one of the two federal suits which were voluntarily dismissed, and even if she had been a co-plaintiff in both, those two suits were based upon alleged violations of the Federal Civil Rights Act and other tort claims, whereas the complaint herein is based upon a claim for recognition of a foreign nation judgment, an entirely different claim.

I, the undersigned, do hereby apply to the ACCREDITED SURETY & CASUALTY COMPANY, INC., to act as my bail in the amount of $ 137,500 00 In the Circuit court of Putnam Co. wherein I am charged with 28 Cases involving Land Fraud

TERMS AND CONDITIONS

The following terms and conditions are an integral part of this application for appearance BOND # TA 530409 thru 530418; 530426 thru 530436; 534501 thru 534507

for which ACCREDITED SURETY & CASUALTY COMPANY, INC., (hereinafter called the SURETY), or its Agent shall receive a premium in the amount of ($ 13,750 00) Dollars, and the parties agree that said appearance Bond is conditioned upon full compliance by the principal of all said terms and conditions and is a part of said bond and application therefore.

1. The SURETY, as bail, shall have control and jurisdiction over the principal during the term for which the bond is executed and shall have the right to apprehend, arrest and surrender the principal to the proper officials at any time as provided by law.

2. In the event surrender of principal is made prior to the time set for principal's appearances, and for reason other than as enumerated below in paragraph 3, then principal shall be entitled to a refund of the bond premium.

3. It is understood and agreed that the happening of any one of the following events shall constitute a breach of principal's obligations to the SURETY hereunder, and the SURETY shall have the right, to forthwith apprehend, arrest and surrender principal, and principal shall have no right to any refund of premium whatsoever. Said events which shall constitute a breach of principal's obligations hereunder are:

(a) If principal shall depart the jurisdiction of the court without the written consent of the court and the SURETY or its Agent.

(b) If principal shall move from one address to another within the State of California without notifying the SURETY or its agent in writing prior to said move.

(c) If principal shall commit any act which shall constitute reasonable evidence of principal's intention to cause a forfeiture of said bond.

(d) If principal is arrested and incarcerated for any other offense other than a minor traffic violation.

(e) If principal shall make any material false statement in the application.

Resident Phone 415 7[illegible]

Alias _____ Neighbor Phone 771 52[illegible]

Nickname _____ Job Phone _____

1. Name SIDNEY LEONARD JAFFE

2. Address 1000 GREEN ST SAN FRANCISCO CALIF. How Long 3 YR.

Previous Address 44 CHARLES ST WEST TORANTO CANADA How Long 8 YRS

3. Employer ATLANTIC COMMERCIAL DEVELOP SO FRANCISCO How Long 4 YR.

Former Employer SELF EMPLOYED INVESTOR How Long LIFE

4. D.O.B. 12-22-26 Where NEW YORK CITY How long this county _____

Sex M Race W Height 6'3" Weight 185 Eyes BRN Hair GRAY Comp. MED

Occupation EXECUTIVE Scars or marks N/A

5. Husband or wife RUTH Employer H/W How long married 30 YRS

6. Children - Age _____ School _____

7. Own or rent home _____ From whom 1000 GREEN ST. CORP.

8. Full description of auto AUDI 79 WHT Tag No. _____

Where financed _____ Amt. owed _____ BOND REGISTERED BY: E

9. Dr. Lic. _____ S.S. 232-16-3964 Life Ins. Co. _____ INFORMATION TAKEN BY: [illegible]

10. Name and number of any labor union, club, lodge or etc. NONE FILED BY: _____

11. List all previous arrests NONE

12. Bonded before by NONE Still Indebted _____

	NAME	OCCUPATION	ADDRESS – PHONE
Attorney	BRUCE GRUER	ATT	1 BYCANE BLVD MARIN TERR. –
~~Best friend~~	Barri Jurupa	atty:	
References			
	HAROLD JAFFE	ATT	100 WEBSTER ST OAKLAND Phone = 415 444 2261
Buddy			
Father	DEC.		
Mother	DEC.		
Brother	ROBERT JAFFE	ATT	NEW JERSEY
Brother			
Sister			
~~Son~~	BRANDON JAFFE	STUDENT	U. of BRITISH COLUMBIA
Brother-in-law			
Sister-in-law			
	M. JACOBSON		3955
Mother-in-law			
Sister			
Sister			

For good and valuable consideration, the undersigned principal hereby agrees to indemnify and/or hold harmless, the Accredited Surety & Casualty Company, Inc., its agents for any and all losses not otherwise provided by law, or rules and regulations promulgated under any applicable [illegible]

Executed at _____ this _____ day of _____ 19__

_____ Signature of Applicant

Date

Job Change

Address Change

APPENDIX 3

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY L. JAFFE and
RUTH M. JAFFE,

Plaintiffs,

vs.

STEPHEN L. BOYLES,
et al.,

Defendants.

No. 85-1128-Civ-J-16

(Filed Nov. 5, 1986)

ORDER OF DISMISSAL WITHOUT PREJUDICE

This cause came before the Court for the hearing on the Order to Show Cause entered on October 3, 1986, at which the Court heard argument on defendant's, ACCREDITED SURETY AND CASUALTY CO., INC. ("Accredited"), Motion for Sanctions pursuant to Rule 37(d), *Fed.R.Civ.P.*, filed August 19, 1986, and Plaintiffs' Motion to Dismiss Action Without Prejudice pursuant to Rule 41(a)(2), *Fed.R.Civ.P.*, filed August 29, 1986. After thorough review and consideration of the pleadings filed herein and the arguments of counsel for the parties, the Court concludes that this action should be dismissed without prejudice.

In its Motion for Sanctions, Accredited requests that this cause be dismissed with prejudice for Plaintiffs' failure to cooperate in discovery. The Court would be inclined to grant said motion and dismiss this action with

prejudice in light of Plaintiffs' flouting of the authority and jurisdiction of this Court and the Federal Rules of Civil Procedure. *See, e.g., Jaffe v. Grant*, 793 F.2d 1182, 1189-90 (11th Cir. 1986). Plaintiffs unjustifiably failed to appear at depositions noticed by Accredited and scheduled to take place in Jacksonville, Florida. *See* Rule 3.04(c), *Local Rules of the United States District Court for the Middle District of Florida*. Further, Plaintiffs defied this Court's Order to Show Cause entered on October 3, 1986 and failed to appear at the aforementioned hearing. In spite of Plaintiffs' conduct, however, the Court concludes that it was divested of jurisdiction to entertain Accredited's Motion for Sanctions when Plaintiffs filed on August 29, 1986 their Notice of Dismissal pursuant to Rule 41(a)(1), *Fed.R.Civ.P.*, as to Defendants, ACCREDITED, HANK M. SNOW, TIMM JOHNSEN, DANIEL J. KEAR, and JOSEPH MILLER.

As to Defendants, STEPHEN L. BOYLES, WILLIAM HATCH, GLENN E. NORRIS, CLYDE SHOEMAKE, and LOUIS R. STARK, the Court finds that they would suffer no plain legal prejudice other than the mere prospect of a second lawsuit if this cause were dismissed without prejudice. *See McCants v. Ford Motor Company, Inc.*, 781 F.2d 855, 856-57 (11th Cir. 1986).

Accordingly, it is now

ORDERED and ADJUDGED:

1. That, as to Defendants, ACCREDITED, HANK M. SNOW, TIMM JOHNSEN, DANIEL J. KEAR, and JOSEPH MILLER, this Court's Order to Show Cause entered on October 3, 1986 be and the same is held for NAUGHT,

without prejudice to Defendants' rights under Rule 41(d), *Fed.R.Civ.P.*

2. That Plaintiffs' Motion to Dismiss Action Without Prejudice be and the same is hereby GRANTED, and this cause is hereby DISMISSED without prejudice as to Defendants, STEPHEN L. BOYLES, WILLIAM HATCH, GLENN E. NORRIS, CLYDE SHOEMAKE, and LOUIS R. STARK.

DONE and ORDERED in Chambers at Jacksonville, Florida this 5 day of November, 1986.

/s/ Joe H. Moore
UNITED STATES DISTRICT JUDGE

Copies to:

✓ Bruce A. Goldstein, Esquire
✓ James C. McKay, Esquire
✓ Shirley A. Walker, Esquire
✓ Francis M. McDonald Jr. Esquire
✓ Mark Mahoney, Esquire
✓ Paul J. Suozzi, Esquire
✓ Ed Leinster, Esquire
✓ Joe C. Miller, Esquire
✓ U.S. District Judge
✓ Courtroom Deputy

APPENDIX 4

Court File No. 498/66

COURT OF APPEAL FOR ONTARIO

RE: HER MAJESTY THE QUEEN (Respondent) v. DANIEL JOHN KEAR and TIMM JOHNSEN (Appellants)

BEFORE: BROOKE, KREVER and GALLIGAN JJ.A.

COUNSEL: FOR THE APPELLANTS
D.R. O'Connor, Q.C., Robert Russell and Diane Oleskiw

FOR THE RESPONDENT
Brian Gover and Scott Hutchison

HEARD: September 28, 29 and October 2, 1989

ENDORSEMENT

During argument counsel for the appellants raised three grounds of appeal from conviction.

1. It was submitted that the learned trial judge misdirected the jury when he said that the specific intent prescribed by s.279(1)(b) did not require the Crown to prove that the appellants knew that the removal of Jaffe from Canada was unlawful according to the law of Canada. We are of the opinion that the *mens rea* of the offence of which the appellants were convicted does not include subjective knowledge that their transportation of Jaffe out of Canada was unlawful.

2. It was submitted that they had an honest belief that they were acting lawfully, which belief was officially induced. The court did not call upon the Crown to reply to this ground of appeal because it was of the opinion,

assuming without deciding that the defence of officially induced error applies to indictable offences, that there was no evidence which would give an air of reality to that defence in this case.

3. It was submitted that the appellants had lawful authority to apprehend Jaffe and return him to the court in Florida from which he had absconded. They based the claim of lawful authority upon the agreement, Exhibit 10, and upon the common law powers of a surety to seize an accused and deliver him to the court before whom he must appear. Those powers under the contract and at common law are undoubtedly broad. However, no Canadian case was cited to us which suggests that those powers extend across international boundaries. There is jurisprudence in the United States which holds that the authority of an American surety to seize an absconding principal can only be exercised within the territorial bounds of the United States itself. See *Kear v. Hilton* (1983), 699 F. 2d 181 at p.182 and *Reese v. United States* (1869), 76 U.S. 13. In our opinion such foreign contracts or common law rights, even though recognized in the foreign country, cannot authorize the violation of Canadian sovereignty. The policies enshrined in the *Canadian Bill of Rights*, which was in force at the time of this offence, and in the *Canadian Charter of Rights and Freedoms*, which has since come into force, are conclusive of this issue. The power of arrest which the appellants had in Florida and perhaps in other parts of the United States were of no effect in Canada. The appellants had no other source of power in Canada and therefore they were without lawful authority when they seized Jaffe and took him out of Canada.

The appeals from conviction must therefore be dismissed.

We think the appeals from the sentences imposed by the trial judge should succeed. The trial judge rightly considered the offence to be a grave affront to the sovereignty of this country. Although it is not excused, the gravity of the affront is mitigated by the circumstances of the offence. In consideration of the surety putting up $137,000 U.S. to secure his freedom from jail and after being told by the surety that if he did not appear at court they would come and get him anywhere, Jaffe agreed in writing that the surety would have the right "to forthwith apprehend, arrest and surrender" him. In violation of his obligations to the court which had released him from jail and to the prejudice of the surety's $137,000, Jaffe, who was then an American citizen, absconded and fled to this country where he managed to obtain Canadian citizenship. There is nothing favourable that can be said about his conduct.

The trial judge found that both appellants had a general overriding belief that the contract constituted some authority for them to apprehend Jaffe even though that belief was arrived at negligently. It is also clear that the purpose of seizing Jaffe was to return him to the court that had jurisdiction over him.

Both appellants are men of good character and repute. The trial judge commented "in my many years on the bench I have never seen such an outpouring of support for two individuals".

It is our opinion that the very conviction of those men of one of the most serious offences known to Canadian law would go a long way towards the vindication of Canada's sovereignty and towards the repudiation of their affront to it.

We have received evidence that since their trial the convictions have had a serious prejudicial effect upon the lives of the appellants. In addition, each is faced with impending domestic tragedy which require their physical and moral support.

Having regard to all of the circumstances and taking particular account of the evidence of what has transpired since their convictions we think the interests of justice would be served if the sentences imposed upon the appellants by the trial judge were reduced to time served. Leave to appeal is granted. The sentence appeals of the appellants are allowed accordingly. The Crown's application for leave to appeal sentence is granted but its appeal is dismissed.

October 18, 1989 /s/ Illegible

/s/ Illegible

/s/ Illegible

APPENDIX 5

* * *

60. The plaintiff Sidney Jaffe pleads that by reason of the foregoing the defendants are liable for the said damage.

61. The plaintiff Sidney Jaffe pleads that much of the said damage was suffered in the City of Toronto, and that he continues to suffer the said damage in the City of Toronto.

62. The plaintiff Ruth Jaffe pleads that she has expended considerable time and effort to redress the wrongful actions of the defendants and in the administration of the affairs of the plaintiff Sidney Jaffe during the period of his wrongful imprisonment, and incurred expense in travel to and from Florida and otherwise to visit and to obtain the release of the plaintiff Sidney Jaffe from his wrongful imprisonment.

63. The plaintiff Ruth Jaffe further pleads that by reason of the foregoing she has suffered and continues to suffer serious damage, by reason of her mental and physical suffering, loss of income, the aforesaid expenditures, and the loss of guidance, care and companionship of the plaintiff Sidney Jaffe during the period of his imprisonment. The plaintiff Ruth Jaffe pleads that she has suffered and continues to suffer this damage in the City of Toronto.

* * *

Supreme Court, U.S.
FILED
SEP 8 1993
OFFICE OF THE CLERK

No. 93-241

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

Ruth Jaffe,

Petitioner,

v.

Hardy M. Snow, Jr. and Accredited Surety & Casualty Company, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Fifth District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Government of Canada hereby moves for leave to file a brief as *amicus curiae* in support of Petitioner Ruth Jaffe pursuant to Sup. Ct. R. 37.2. The consent of Petitioner Ruth Jaffe has been filed with this Court. Remarkably, Respondents, Hardy M. Snow, Jr. and Accredited Surety & Casualty Company, Inc., have refused their consent to the filing of this *amicus curiae* brief. Attached as Exhibit A is the Government of Canada's letter to Respondents and Respondents' response "vehemently object[ing]" to the filing of this brief.

As this Court is aware, it was the Clerk of this Court who first requested the U.S. Department of State to inform foreign governments that they should make their views known to the Court by filing amicus briefs. In a diplomatic circular to the U.S. Chiefs of Mission, dated August 17, 1978, the U.S. Department of State specifically stated:

> The United States will consent to such a[n amicus] filing in any case in which it is a party. *In the unlikely event that any other party should decline to consent, the Supreme Court will almost certainly grant the motion of a foreign government for leave to file a brief.*[1]

Respondents' refusal to consent to permit the Government of Canada's views lacks any justification. The Government of Canada respectfully requests permission to file this brief so that the Court can have the benefit of Canada's views on important international issues as to which Canada is in a strong position to comment.

INTEREST OF THE AMICUS CURIAE

The Government of Canada is filing this brief in support of the Petition for Writ of Certiorari because important policies of Canada and the United States in deterring transborder kidnapping are implicated. Although the judgment below was purportedly based on the public policy of Florida, the transborder kidnapping in Canada at issue in this case constituted both a breach of Canada's criminal law and a breach of international law. The Government of Canada submits that the court below failed to consider the public policy of the United States as evidenced in the January 11, 1988 Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition, as well as the principles of international comity.

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1. *Reprinted in*, 73 Am. J. Int'l. L. 124 (emphasis supplied).

STATEMENT OF FACTS

Ruth Jaffe sued the Respondents in the Supreme Court of Ontario, seeking damages in connection with expenses incurred following the wrongful abduction of Sidney Jaffe from Canada to the United States by United States bounty hunters hired by the Respondents. On November 22, 1990, the Supreme Court of Ontario found in favor of Mrs. Jaffe and awarded her money judgment.

Mrs. Jaffe then brought an action in the Ninth Judicial Circuit in and for Orange County, Florida, seeking recognition and enforcement of the judgment rendered by the Supreme Court of Ontario. The court entered summary judgment in favor of the Respondents.

Mrs. Jaffe appealed that ruling to the District Court of Appeal of the State of Florida, Fifth District, which affirmed the Circuit Court's judgment on November 13, 1992.[2] A rehearing was denied on January 12, 1993. A motion to invoke the jurisdiction of the Supreme Court of Florida was denied on May 10, 1993.

Mrs. Jaffe petitioned this Court for a writ of certiorari to the District Court of Appeal of the State of Florida, Fifth District on August 9, 1993.

SUMMARY OF ARGUMENT

The Government of Canada submits that in determining public policy, for the purposes of recognizing and enforcing foreign judgments, United States courts should have regard to international agreements and principles of international comity, which constitute the public policy of the United States. The United States Government has undertaken in an Exchange of Letters with the Canadian Government to cooperate to deter transborder kidnapping.[3] The District Court

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2. *Jaffe v. Snow*, 610 So. 2d 482 (Fla. Dist. Ct. App. 1992).

3. The January 11, 1988 Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition states: ". . . Canada and the United States agree to cooperate

of Appeal of the State of Florida, Fifth District erred in failing to take this into account.

ARGUMENT

I. THE TRANSBORDER KIDNAPPING CONSTITUTED AN INFRINGEMENT OF CANADIAN TERRITORIAL SOVEREIGNTY AND WAS CONTRARY TO THE CANADA-UNITED STATES EXTRADITION TREATY, THE SUBSEQUENT CANADA-UNITED STATES LETTER OF UNDERSTANDING ON TRANSBORDER KIDNAPPING, AND INTERNATIONAL LAW

The Government of Canada's participation is based in part on the United States' position on the issue of transborder bounty hunting and the reliance Canada may place on the undertakings of the United States Government to deter such activities and to exert its best efforts to inform those engaged in transborder bounty hunting that such activities are illegal and that offenders will be subject to extradition. It is also grounded in concerns about the effective implementation of the Canada-United States Extradition Treaty.

The abduction of Sidney Jaffe from his home in Toronto, Canada to Florida by U.S. bounty hunters hired by the Respondents was a blatant infringement of Canadian territorial sovereignty and was contrary to the Canada-United States Extradition Treaty and international law.

Transborder bounty hunting has been condemned by the international community. It is the criminal offence of kidnapping in Canada, the United States and Florida; kidnapping is an extraditable offence in both countries.[4] The Canadian Government filed formal protests with the United States Government objecting to the abduction and demanding Mr.

NOTES *(Continued)*

to deter such transborder abductions . . .". (27 I.L.M. 422 (1988), Appendix B.)

4. See Extradition Treaty Between the United States of America and Canada, 27 U.S.T. 983 (1976), Appendix A-40, Petitioner's Brief and Protocol Amending the Treaty Between Canada and the United States of America, 27 I.L.M. 422 (1988), Appendix A-42, Petitioner's Brief.

Jaffe's release. The United States Department of Justice and the United States State Department condemned the abduction of Mr. Jaffe from Canada as a violation of United States public policy.

The gravity of the incident was recognized by United States Secretary of State George Shultz in the following words:

> . . . it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.[5]

Secretary of State Shultz recognized the serious effect of the kidnapping on Canada-United States relations. He said:

> . . . the Jaffe case threatens to have a generally deleterious effect on our relations with Canada.[6]

And he stated the public policy of the United States in this matter as follows:

> It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most important and highly valued neighbors . . .[7]

Canada sought extradition of the bounty hunters. The United States Government refused to excuse or exonerate the bounty hunters and extradited them to Canada where they were tried and convicted.[8] Extradition to Canada from Florida was not denied by the United States Government or the Florida Courts because of any activities that may have been undertaken by Mr. Jaffe in Florida. The bounty hunters hired

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5. Statement of George P. Shultz, Secretary of State, before the State of Florida Probation and Parole Commission In re: Sidney Leonard Jaffe, 2-3 (June 22, 1983) (attached as Appendix C).

6. *Id.*

7. *Id.*

8. *Kear v. Hilton*, 699 F.2d 181, 185 (4th Cir. 1983); *Johnson v. Kear*, (Ont. H.C. June 9, 1986), *aff'd*, 5 C.C.C. (3d) 574 (Ont. C.A. 1989).

by the Respondents were convicted; no justification for their actions could be found by the court in any activities carried out by Mr. Jaffe in Florida.

The policy of the United States Government concerning transborder bounty hunting is demonstrated in the January 11, 1988 Exchange of Letters Constituting an Understanding Between the Government of Canada and the Government of the United States of America Concerning the Protocol Amending the Treaty on Extradition (the "Canada-United States Letter of Understanding").[9] The Canada-United States Letter of Understanding, signed by the United States Secretary of State and the Canadian Secretary of State for External Affairs, reads in part as follows:

> The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail-bonding companies . . . is an extraditable offense under the United States-Canada Extradition Treaty.

Both countries agreed to take action against transborder bounty hunting:

> . . . Canada and the United States agree to cooperate to deter such transborder abductions . . .

Of particular relevance in the petition is the undertaking made in the letter by the United States to Canada, which reads as follows:

> [T]he United States will continue to exert its best efforts to inform those engaged in business as bail-bondsmen or bounty hunters . . . of the positions set forth in this exchange of letters.

This policy applies to persons found in Canada irrespective of citizenship.

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9. *Supra*, note 3 (Appendix B).

II. THE FLORIDA COURT'S DECISION FAILED TO ACCORD PROPER WEIGHT TO THE KIDNAPPING'S VIOLATION OF INTERNATIONAL AGREEMENTS AND INTERNATIONAL COMITY.

Florida did not petition the United States government to request Mr. Jaffe's extradition, and Canada did not refuse a request for Mr. Jaffe's extradition. This is not a case where the extradition process was tried and failed. There was no justification for extraordinary measures to be taken; Florida has used the Treaty successfully before and since the Jaffe instance to obtain the return of fugitives. The Court of Appeal failed to give effect to the Letter of Understanding and the Extradition Treaty.

Canada has a right to rely on the undertaking set out in the Canada-United States Letter of Understanding. The judgement of the Florida Court of Appeals failed to take into account the undertakings of the United States Government. The Canada-United States Letter of Understanding should be respected and given consideration by United States courts in the determination of public policy as it relates to the question of recognizing and enforcing the judgment of the Supreme Court of Ontario.

CONCLUSION

In reaching its decision, the Florida Court of Appeal failed to consider the public policy of the United States concerning transborder kidnapping. This is an important issue of national and international public policy which should be considered. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for the Government
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September 8, 1993

APPENDIX

APPENDIX A

COUDERT BROTHERS
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September 1, 1993

BY FACSIMILE AND MAIL

Sharon Lee Stedman, Esq.
1516 E. Hillcrest Street
Suite 200
Orlando, FL 32803

Re: *Ruth Jaffe v. Hardy M. Snow, Jr. & Accredited Surety & Casualty Company, Inc., No. 93-241*

Dear Ms. Stedman:

We are writing you on behalf of the Government of Canada to request the consent of Respondents, Hardy M. Snow, Jr. and Accredited Surety & Casualty Company, Inc., to the filing by the Government of Canada of an *amicus curiae* brief in support of the petition for writ of certiorari in the above referenced case. In view of the very tight filing deadline we would appreciate your sending us the consent in writing by facsimile and courier within the next 48 hours.

We have been advised that your clients may not consent to the Government of Canada's amicus brief. If your clients do not wish to consent, would you please advise us of their reasons for not consenting.

Thank you for your cooperation.

Sincerely,

/s/ Douglas E. Rosenthal
Kay C. Georgi

Douglas E. Rosenthal
Kay C. Georgi

APPENDIX A (Cont'd)

LAW OFFICES

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September 2, 1993

Via Fax No. 202-775-1168

Mr. Douglas E. Rosenthal
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1627 I Street, N.W.
Washington, D.C. 20006

Re: *Ruth Jaffe v. Hardy M. Snow, Jr. and Accredited Surety & Casualty Company, Inc.* No. 93-241

Dear Mr. Rosenthal and Ms. Georgi:

This is to acknowledge your facsimile to me of September 1, 1993, requesting the respondents' consent to the filing of an *amicus curiae* brief in support of the petition for writ of certiorari by the Government of Canada in the above-referenced case. Please be advised that the respondents vehemently object to this filing. In addition, I believe that the time has expired for any such filing.

Please let me know if I can be of any further assistance.

Sincerely yours,

/s/ Sharon Lee Stedman

SLS/msw

APPENDIX A (Cont'd)

LAW OFFICES

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September 3, 1993

Via Fax No. 202-775-1168

Mr. Douglas E. Rosenthal
Ms. Kay C. Georgi
Coudert Brothers
1627 I Street, N.W.
Washington, D.C. 20006

Re: *Ruth Jaffe v. Hardy M. Snow, Jr. and Accredited Surety & Casualty Company, Inc.* No. 93-241

Dear Mr. Rosenthal and Ms. Georgi:

Subsequent to my letter and facsimile to you of September 2, 1993, I have learned that the filing of an *amicus curiae* brief can be filed with the response in opposition to the petition for writ of certiorari, contrary to my understanding that it had to be filed at the time that the petition for writ of certiorari was filed. Nevertheless, the respondents still vehemently object to any such filing.

Sincerely yours,

/s/ Sharon Lee Stedman

SLS/msw

APPENDIX B

Letter of Secretary Shultz, January 11, 1988

THE SECRETARY OF STATE
WASHINGTON

January 11, 1988

Dear Mr. Minister:

I refer to the Protocol Amending the Treaty on Extradition between the United States and Canada we signed today and have the honor to address to you the following.

The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters", is an extraditable offense under the United States – Canada Extradition Treaty.

Where a person has been charged with or convicted of such an offense in Canada and is found within the jurisdiction of the United States, the United States agrees, upon request, to commence extradition proceedings against such a person pursuant to the Treaty in order that the person may be returned to Canada.

The United States will use its best efforts to honor Canadian requests for testimony, information, or other assistance pertaining to such abductions.

Canada and the United States agree to cooperate to deter such transborder abductions. To assist in achieving that purpose, the United States will continue to exert its best efforts to inform those engaged in business as bail bondsmen or bounty hunters and other interested parties of the positions set forth in this exchange of letters.

Canada and the United States agree to consult promptly concerning any case of transborder abduction involving bounty hunters which might arise in the future. The purpose of such consultation shall be to address matters relating to any such case, including any request by the Government of Canada for the return of the person so abducted. In the event of return, the Governments agree to co-operate to have the

abducted person escorted to Canada and taken into custody at the border, pursuant to a request for provisional arrest, pending the outcome of extradition proceedings. For the purpose of these consultations, the principal law enforcement contact for the United States will be the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

The Right Honorable
Joe Clark, P.C., M.P.,
Secretary of State
For External Affairs of Canada,
Ottawa.

I have the honor to propose that this letter and your reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Sincerely yours,

/s/ George P. Shultz
George P. Shultz

APPENDIX B (Cont'd)

Letter of Secretary Clark, January 11, 1988

THE RT. HON. JOE CLARK, P.C., M.P.
SECRETARY OF STATE FOR EXTERNAL AFFAIRS

CANADA

Ottawa, January 11, 1988

JLA-0026

Dear Mr. Secretary:

I have the honour to acknowledge receipt of your letter of today's date concerning transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters". I accept your proposal that your letter and this reply constitute an Understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Yours sincerely,

/s/ Joe Clark

The Honorable George P. Shultz
Secretary of State of the
United States of America

APPENDIX C

Statement of Secretary Shultz, June 22, 1983

STATE OF FLORIDA

PROBATION AND PAROLE COMMISSION

IN RE: SIDNEY LEONARD JAFFE
INMATE #082007

STATEMENT OF GEORGE P. SHULTZ, SECRETARY OF STATE

I urge you to grant parole to Sidney Jaffe on the ground that his continued incarceration will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida to face the charges which resulted in his imprisonment.

The circumstances of Mr. Jaffe's return from Canada to Florida were examined in the opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Middle District of Florida in the cases of Daniel Kear and Timm Johnsen, respectively. In brief, the courts found that Kear and Johnsen were extraditable to Canada, a showing having been made of probable cause to believe that the two "bounty hunters," who were acting as agents of the company that had posted bond for Mr. Jaffe, had kidnapped Jaffe in Toronto, Canada and had brought him back to Florida.

The United States has an extradition treaty with Canada. That treaty could have been utilized to secure Mr. Jaffe's return; no one has suggested the contrary. How, then, did it happen that Mr. Jaffe was returned by Kear and Johnsen?

Canada, in a petition for writ of habeas corpus filed in the United States District Court for the Middle District of Florida, alleges that Kear and Johnsen were "acting pursuant to a plan promoted by officials of the State of Florida and under the color of authority of the State of Florida." The officials of the State of Florida whose conduct has been called into question by Canada deny the charges, I understand, and I do not now take any position on the question whether there was state action or involvement in the alleged kidnapping of Mr. Jaffe.

However, failure to utilize our extradition treaty with Canada to secure Mr. Jaffe's return does appear to be attributable to the Office of State Attorney Stephen L. Boyles, according to the report to Governor Graham prepared by the Governor's General Counsel. On May 18, 1981, when Mr. Jaffe failed to appear, Judge Perry ordered the State Attorney to initiate extradition proceedings. Any request for Mr. Jaffe's extradition would have been made by the Governor on the basis of supporting materials prepared by the State Attorney's office. Documents submitted by the State Attorney's office were found by the Governor's office to be legally insufficient to support a request for Mr. Jaffe's extradition on July 2, and again on July 23, 1981. Mr. Jaffe was returned from Canada under the circumstances of which Canada complains on September 24, 1981. In the intervening two months the State Attorney's Office failed to make any further effort to submit legally sufficient documentation to the Governor's office in support of a request for Mr. Jaffe's extradition.

As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.

I wish to emphasize that Canada is our most important extradition treaty partner and that the maintenance of the excellent extradition relationship we have had with Canada is greatly in the law enforcement interest of Florida and the other states, as well as of the federal government. Indeed, in the last three full calendar years, sixty per cent of the fugitives surrendered to the United States pursuant to extradition

requests made by states, as opposed to the federal government, were surrendered by Canada.

Moreover, quite apart from law enforcement cooperation, the Jaffe case threatens to have a generally deleterious effect on our relationships with Canada. Canadian authorities have raised this matter in virtually every recent high level contact between our two nations. It is simply in the national interest that this case no longer be permitted to intrude upon our relations with one of our most important and highly valued neighbors, allies and trading partners.

For the foregoing reasons, I urge you to grant parole to Sidney Jaffe.

/s/ George P. Shultz
GEORGE P. SHULTZ
Secretary of State

July 22, 1983
Date

MOTION FILED

SEP 10 1993

No. 93-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

vs.

HARDY M. SNOW, JR. and
ACCREDITED SURETY & CASUALTY
COMPANY, INC.,
Respondents.

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CANADIAN HELSINKI WATCH GROUP IN SUPPORT OF PETITIONER

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No. 93-241

IN THE
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OCTOBER TERM, 1993

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ACCREDITED SURETY & CASUALTY
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Respondents.

ON WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

MOTION OF THE CANADIAN HELSINKI WATCH GROUP FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

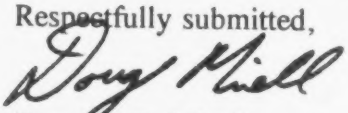
The Canadian Helsinki Watch Group respectfully moves for leave to file the annexed brief as *Amicus Curiae* in this case. Petitioner has consented to the filing of the brief; respondents have not confirmed their refusal or consent.

The Canadian Helsinki Watch Group is the Canadian member of the International Helsinki Human Rights Federation headquartered in Vienna, Austria, and is a non-governmental organization dedicated to promoting respect for the human

rights components of the Helsinki Accord. The Helsinki Accord is the Final Act of the Conference of Security and Cooperation in Europe signed in Helsinki, Finland in 1975.

The amicus is interested in opposing any violation of international human rights. It is particularly interested when the violation is committed by a signatory to the Helsinki Accord and the victim is a Canadian citizen. Because these issues are raised in this case, we respectfully seek leave to submit this *amicus curiae* brief for the Court's consideration.

Respectfully submitted,



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INTEREST OF AMICUS CURIAE

The Canadian Helsinki Watch Group is the Canadian member of the International Helsinki Human Rights Federation headquartered in Vienna, Austria, and is a non-governmental organization dedicated to promoting respect for the human rights components of the Helsinki Accord. The Helsinki Accord is the Final Act of the Conference of Security and Cooperation in Europe signed in Helsinki, Finland in 1975.

The Helsinki Accord provides that the participating states will respect the territorial integrity of each of the participating states. (Declaration of Principles Guiding Relations between Participating States, Article III). It further provides that participating states will refrain from any act of coercion designed to subordinate to their own interests the exercise by another participating state of the rights inherent in its sovereignty and thus to secure advantages of any kind. (Article VI) Under the Accord, each participating state recognizes the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and cooperation among themselves as among all states. (Article VII) Both Canada and the United States are signatories to the Helsinki Accord.

The above provisions, and the Helsinki Accord generally, link respect for human rights with friendly relations between states. That linkage is particularly close when human rights violated by one state are the human rights of a citizen of another signatory state. These violations, in particular, are likely to jeopardize friendly relations between signatory states.

The amicus is interested in opposing any violation of international human rights. It is particularly interested when the violation is committed by a signatory to the Helsinki Accord and the victim is a Canadian citizen.

STATEMENT OF THE CASE

The Amicus accepts the statement of the case in the Petition for Writ of Certiorari of the Petitioner.

SUMMARY OF ARGUMENT

1. The abduction of Sidney Jaffe, the husband of the Petitioner, is a violation of international human rights law.

2. This violation vests in Ruth Jaffe a right to compensation at international law.

3. Failure to comply with the relevant international law would offend the public policy and sense of moral justice of the U.S. courts.

ARGUMENT

1. The Abduction of Sidney Jaffe is a Violation of International Law.

The courts in the United States have recognized that international law prohibits the illegal seizure, removal and detention of an alien against his will in a foreign country. The Second Circuit in U.S. v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974), held specifically that international kidnappings violate the United Nations Charter. The Court referred to a long standing principle of international law that abductions by one state of persons located within the territory of another violates the territorial sovereignty of the second state. Id. See also Nguyen Da Yen v. Henry Kissinger, 528 F.2d 1194, 1201 fn. 13 (9th Cir. 1975) (illegal seizure, removal and detention

of Vietnamese children to the U.S. by various agencies of the U.S. government is a violation of the law of nations).[1]

This principle has in fact been applied directly to condemn the conduct of the Respondents in this case. In Jaffe v. Boyles, 616 F.Supp. 1371, 1379 (W.D.N.Y. 1985), a case involving the Petitioner and the Respondents in this case, Chief Judge Curtin of the United States District Court, Western District New York, held that the conduct of the Respondents may well amount to a tort in violation of the law of nations.

It is further recognized that international law prohibits a tort in violation of the law of nations regardless of whether the wrongdoer is acting for a state or on his own. In Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) the Court first noted that an action by a state official in violation of the constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could not properly be characterized as an act of state. Id. The Court then held that nonetheless the alleged torture causing death by Pena-Irala of Joelita Filartiga violated the law of nations. Id. at 890.

---

[1] It is now accepted that international human rights law is violated where the state violates internationally recognized rights and the victim is one of its own citizens. Yet even during the period when the U.S. courts questioned whether the international law of human rights applied to a state's treatment of its own citizens, there was no question that it applied to a state's treatment of foreign nationals. See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). Thus, while it cannot be said that violation of the international human rights of a foreign national is a greater violation of international law than violation of the international human rights of the state's own citizens, the violation of the rights of a foreign national is a violation that has a longer history of recognition in international law and the U.S. Courts. In that sense, the failure of the Florida courts to pay heed to the violation in this case is a particularly egregious disregard of international human rights law.

The amicus submits that a wholly private act done by a person that has no connection with government, who acts even in opposition to government, may still violate international law. See J.G. Starke, "Introduction to International Law", (9th Ed. 1984) at Chapter Three. But this principle need not be tested here. It is undeniable that in this case the Respondents were acting on behalf of, and by color of the law of, the State of Florida.

The nexus between Respondents' wrongdoing and the Government of the State of Florida is established by the following undisputed facts. The Respondents arranged for the abduction in order to bring Sidney Jaffe before the Florida state courts. The Respondents were expressly acting pursuant to a Florida state law that allows for the arrest of a principal within the state both before and after the forfeiture of a bail bond. Indeed, the Florida state court in this case expressly stated that the public policy of Florida favors and sanctions the apprehension of a bond jumper within the state. See Opinion Rom Powell, Circuit Judge, Ninth Judicial Circuit, Orange County, Florida, Petition for Writ of Certiorari, page A-23. Further, when Sidney Jaffe was abducted and brought before the Florida courts, the Florida courts assumed jurisdiction over him despite his illegal arrest and detention, and proceeded to judgment on the charges against him.

The fact that the Respondents' acts went beyond what the laws of the State of Florida allow does not change the official character of their acts. If acts of an official character were restricted only to acts that the law of the state allowed, then the law of nations would never be violated by the most egregious wrongs of those acting for the state. This nonsensical result is not the law. See Forti v. Suarez-Mason, 672 F.Supp 1531, 1546 (N.D.Cal. 1987).

The Florida courts in this case have refused to recognize the violation of international law by the Respondents, and have refused to enforce the Canadian judgment for reparations obtained by Petitioner, for a single reason -- the

wrongdoing of Sidney Jaffe. Florida's analysis is flawed for two reasons.

First, the Petitioner submits that her position is not derivative of that of Sidney Jaffe. The amicus endorses that position. Second, the amicus submits further that, even if the Florida courts are correct and the judgment in favor of the Petitioner derives from any claim that Sidney Jaffe might make, the violation of international law remains.

International kidnapping is wrongful not only when the kidnap victim is innocent of all wrongdoing. It is a violation of international law no matter what the crimes the kidnap victim has committed. This principle was illustrated in the case of Adolf Eichmann who was accused, and ultimately convicted, of Nazi war crimes. In response to a formal complaint filed by Argentina, the Security Council of the United Nations adopted a resolution condemning the kidnapping of Adolf Eichmann to Israel in 1960 and requesting Israel to make reparations "in accordance with the Charter of the United Nations and rules of international law." U.N. document S/4349, June 23, 1960. Adolf Eichmann was of course charged with and convicted of crimes incommensurably more heinous than those alleged against Sidney Jaffe.

2. The Violation of International Law Committed Against Sidney Jaffe Vests in Ruth Jaffe a Right to Compensation at International Law.

A. The Right To Compensation Is Recognized Under International Law.

Under international law, victims of human rights violations have a right to compensation. A detailed study of this right is set out in a sequence of reports prepared by a United Nations Special Rapporteur, Theo Van Boven, for the United Nations Subcommission on Prevention of Discrimination and Protection of Minorities. See "Study Concerning the Right to Restitution, Compensation and

Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms", U.N. document numbers E./CN.4/Sub.2/1990/10, 26 July 1990; E/CN.4/Sub.2/1991/7, 25 July 1991; E/CN.4/Sub.2/1992/8, 29 July 1992. See also Theo Van Boven, "The Right to Restitution, Compensation and Rehabilitation", printed in "Justice not Impunity" (International Commission of Jurists, 1992).

The state responsible for the violation has a duty to pay compensation. The duty to pay attaches to the state even where, as here, the act is committed by an entity which is not part of the formal structure of the state but which is empowered by the internal law of that state to exercise elements of the governmental authority. Article 7, Draft Articles of State Responsibility, International Law Commission, (1979) 18 I.L.M. page 1569. In this case, the responsibility of the U.S. is engaged because the Respondents were empowered by the law of Florida to exercise elements of governmental authority, in particular, the power to arrest and detain a bail jumper, and because the Respondents were purporting to act in the exercise of that authority in the abduction of Sidney Jaffe.

The wrong that was done to Ruth Jaffe at international law vests in her a right to compensation in at least two ways. First, the International Covenant on Civil and Political Rights provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 9(5). The United States has signed and ratified the Covenant. Sidney Jaffe was subject to an arrest and detention that was unlawful according to international law and, accordingly, he has a right to compensation. If, as held by the Florida Court of Appeals, Fifth District, the claim of Ruth Jaffe is derivative from a cause of action Sidney Jaffe might have, then Ruth Jaffe herself has right to compensation under this heading. The finding of the Court of Appeals that the claim of Ruth Jaffe is derivative thus strengthens her claim under international law, rather than weaken it.

Second, the abduction of Sidney Jaffe, aside from violating his right to be free from unlawful arrest and

detention, violates rights specific to Ruth Jaffe. The International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary or unlawful interference with her privacy, family or home. Everyone has the right to protection of the law against such interference or attacks. Article 17.

The kidnapping of Sidney Jaffe was an arbitrary and unlawful interference with the privacy, family and home of Ruth Jaffe. By virtue of his kidnapping, Ruth Jaffe is entitled to the protection of the law to remedy the arbitrary and unlawful interference with her rights.

B. The Duty to Pay Compensation Would be Respected by Allowing Enforcement of the Canadian Judgment Against the Respondents.

The Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights guaranteed them by law. Article 8. "Law" in this context includes international human rights law. The International Covenant on Civil and Political Rights commits each state party to the Covenant to ensure that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy and shall develop the possibilities of a judicial remedy. Article 2.

Canada, a signatory to the Covenant, provided Ruth Jaffe with a remedy for the violation of her rights. For the remedy to be effective, the judgment must be enforced in the U.S. If the U.S. courts fail to enforce the judgment granted in Canada, the U.S. will have violated its obligation under the Universal Declaration and its commitment under the Covenant to provide an effective remedy for the violation of Ruth Jaffe's rights.

Further, every state, whether responsible for violations or not, has a duty not to grant immunity to international human rights violators. The United States, by not enforcing the

Canadian judgment against the Respondents, would violate the duty not to grant immunity imposed on U.S. by international law. This is particularly true because the American Declaration of the Rights and Duties of Man provides that every person may resort to the courts to ensure respect for his legal rights. Article 18. The Inter-American Commission on Human Rights, in cases against Argentina and Uruguay dated October 20, 1991, concluded that the laws of those countries which granted immunity to violators of human rights were in violation of the right to justice found in Article 18. The United States is bound by the Declaration by virtue of its being a signatory to the Charter of the Organization of American States.

One of the justifications for the Florida courts' refusal to enforce the Canadian judgment is their expressed belief that compensation is not necessary as a deterrent to the illegal behavior. The Florida Court, Ninth Judicial Circuit, Orange County, stated that as a result of the decision in Kear v. Hilton, 699 F.2d 181 (4th Cir.1983), the criminal laws of Canada and the U.S.-Canada extradition treaty should provide a sufficient deterrent to kidnapping in Canada by U.S. bounty hunters in the future. Petition for Writ of Certiorari, page A-24. The Kear case decided that the bounty hunters could be extradited to Canada for trial on charges arising out of the abduction of Sidney Jaffe. The bounty hunters were extradited, tried, convicted and sentenced in Canada. See Petition for Writ of Certiorari, page A-36.

The amicus submits, firstly, that even accepting that the Kear case provides a deterrent to bounty hunters, it does not provide a deterrent to those who arrange for bounty hunting. In this case the Respondents are not the bounty hunters who were extradited to Canada for trial. If judgment is not enforced against the Respondents, they will have suffered no consequences from their wrongdoing.

The amicus submits, secondly, that even if the potential extradition of kidnapper bounty hunters is a sufficient deterrent against kidnapping, relying on that consideration to deny

compensation ignores the independent principle of compensation for violations of international human rights wrongs. Deterrence may prevent others from being victimized in the future. Deterrence does not compensate for the victimization that has already taken place. The victim herself, in this case Ruth Jaffe, must not be forgotten.

3. Failure to Comply With the Relevant International Law in This Case Would Offend the Public Policy and Sense of Moral Justice of the U.S Courts.

The Florida Court of Appeal, Fifth District, refused to enforce the Canadian judgment on the ground that to do so would offend the public policy and sense of moral justice of the jurisdiction. Petition for Writ of Certiorari, page A-8. The amicus submits that the reverse is true, that not to enforce the canadian judgment would be to offend public policy and the sense of moral justice of the U.S. courts.

As discussed above, not permitting enforcement of the Canadian judgment in the U.S. would result in a violation of international human rights law. Further, where a state grants immunity to a violator of international human rights norms, it becomes complicit in the violations. It cannot be part of public policy that the U.S. courts will disregard these well-accepted principles of international law.

It must be remembered that the American courts have already accepted the wrongfulness under international law of the abduction of Sidney Jaffe. As previously noted, the United States government extradited the bounty hunters to Canada, see Kear v. Hilton, supra, Johnson v. Kear (1989) 5 C.C.C. (3d) 574 (Ont.C.A.). The Florida courts did not prevent this extradition. For the U.S. courts now to grant immunity to the Respondents who hired the bail recovery agents to commit the acts for which they were extradited would be inconsistent.

It should also be remembered that the U.S. courts, for the abduction of Sidney Jaffe, have already permitted criminal sanctions through extradition. It is therefore inconsistent for

these courts to deny the less stringent remedy of compensatory damage on grounds of public policy.[2]

The rulings of the Florida courts were apparently motivated by the desire to ensure respect for the Florida legal system. But respect for Florida law cannot be won at the cost of disrespect for international law, particularly where there is a legal solution available that allows respect for both legal systems. The State of Florida could request the extradition of Sidney Jaffe for jumping bail, but has declined to do so. See Petition for Writ of Certiorari, page A-4. Requesting extradition of Sidney Jaffe for his violation of Florida law and permitting compensation to the Petitioner for the violation of international law would allow both the Florida legal system and the international legal system to be respected.

Finally, there is a compelling diplomatic reason to enforce the Canadian judgment entirely ignored by the Florida courts. The Government of Canada has referred to the Jaffe abduction as "a blatant infringement of Canadian sovereignty" and filed formal protests with the U.S. government objecting to the abduction. The U.S. Government has recognized that the Jaffe case threatens to have a deleterious effect on U.S. relations with Canada, and, indeed, has acknowledged that the case has intruded on its relations with Canada. Petition for Writ of Certiorari, pages A-35, 36.

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[2] The judgment of the Ninth Judicial Circuit, Orange County Florida additionally cites as a rationale a difference between Canadian tort law and Florida tort law. Petition for Writ of Certiorari, A-23. Under Florida tort law a surety for a bail bond may arrest the principal, both before and after forfeiture. Under Canadian law, no such arrest is possible. However, both the judgment of the Florida Circuit Court and the Judgment of the Florida Court of Appeal, Fifth District, ignore the federal Alien Torts Law, 28 U.S.C. § 1350, which provides a remedy for the very wrong at issue here. See Jaffe v. Boyles, supra.

The deterioration in relations between Canada and the U.S. because of the abduction of Jaffe is not hypothetical. It is real and documented. While respect for international human rights law is an end in itself, it also serves a further end, the promotion of friendly relations between states. Enforcement in the U.S. of the Canadian judgment awarded to Ruth Jaffe against the Respondents would help to repair the damage to U.S.-Canada relations that has already been inflicted. The Florida courts nowhere take this factor into account in their public policy considerations. The amicus submits that the Florida courts have erred by this omission.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 8, 1993.

Respectfully submitted,

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No. 93-241

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

v.

HARDY M. SNOW, JR. and
ACCREDITED SURETY & CASUALTY
COMPANY, INC.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC,
AND CENTER FOR CONSTITUTIONAL RIGHTS
IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI

The International Human Rights Law Group (IHRLG), the Allard K. Lowenstein International Human Rights Clinic of the Yale Law School (LIHRC or Clinic), and the Center for Constitutional Rights (CCR or Center) request the Court for leave to file the attached brief amicus curiae supporting the Petition for Writ of Certiorari in this case. Below, the IHRLG filed an amicus brief in the Fifth District Court of Appeals of the State of Florida on behalf of Petitioner, then Plaintiff/Appellant.

INTEREST OF AMICI

The IHRLG is a non-profit legal organization founded in 1978 that provides legal assistance and information on international human rights law and has Category II consultative status with the United Nations Economic and Social Council. The IHRLG provides legal advice in lawsuits raising questions of international human rights and has participated as amicus before this Court in cases including Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549 (1993), Saudi Arabia v. Nelson, 113 S.Ct. 1471 (1993), and United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992).

The Clinic was organized in 1991 at the Yale Law School as a faculty-supervised course under the auspices of the Allard K. Lowenstein International Human Rights Project, a student-run organization that works to educate in international human rights. The Clinic is acting as co-counsel for the plaintiffs in several ongoing lawsuits seeking damages for

violations of international human rights. See, e.g., Evans Paul, et al. v. Prosper Avril, No. 91-0399 (S.D. Fla. filed Feb. 28, 1991); Teresa Xuncax, et al. V. Hector Gramajo, No. 91-11564WD (D. Mass. filed June 6, 1991). During the past two terms, the Clinic was lead counsel before this Court in Sale v. Haitian Centers Council, Inc., 113 S.Ct. 3028 (1993) and Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, and filed amicus briefs in Saudi Arabia v. Nelson, 113 S.Ct. 1471 and United States v. Alvarez-Machain, 112 S.Ct. 2188.

The CCR is a tax-exempt litigation firm devoted to enforcing the U.S. Bill of Rights and the International Bill of Rights in United States courts. CCR was a lead counsel in the landmark case, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (Alien Tort Claims Act, 28 U.S.C. § 1350 (1988), grants federal courts jurisdiction to hear cases seeking compensation for acts of torture outside the United States). Since then, the Center has been co-counsel on

numerous cases seeking damages for violations of international human rights. The questions presented here regarding the enforceability of damages judgments for human rights violations are of great interest to the IHRLG, the Clinic, the Center and their clients.

REASONS FOR GRANTING LEAVE

Counsel for Respondents has refused to grant consent for amici to file the attached brief amicus curiae, and has refused to notify amici of the date of her receipt of the Petition for Writ of Certiorari, filed August 9, 1993. As an amicus below, the IHRLG received a copy of the Petition mailed from Los Angeles to Washington, D.C. on August 11, 1993. Estimating that Respondents' counsel in Florida received the Petition on or after August 11, 1993 as well, amici consider that this Motion and the accompanying brief are timely filed by September 10, 1993, 30 days from receipt on August 11.

In the accompanying brief, amici address important and relevant questions of Federal and

international law that will not otherwise be presented to the Court. The questions have not been presented in the Petition for Writ of Certiorari, and Respondent would have no reason to address such issues that weigh in favor of granting certiorari. The issues highlight the foreign affairs implications of this case and its significance for reciprocal enforcement of U.S. judgments. Because of amici's expertise with respect to such issues, amici respectfully request this Court for leave to file the accompanying brief.

Respectfully submitted,

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Amici Curiae, the International Human Rights Law Group [IHRLG], the Lowenstein International Human Rights Clinic, and Center for Constitutional Rights, respectfully urge this Court to issue a writ of certiorari to the District Court of Appeal of the State of Florida, Fifth District. For the following reasons, amici submit that this case presents substantial and significant questions of Federal

and international law.

Amici adopt and incorporate herein by reference the Statement of the Case set out in the Petition ("Pet."), at pp. 3 - 10.

INTEREST OF AMICI

The IHRLG is a non-profit legal organization founded in 1978 that provides legal assistance and information on international human rights law and has Category II consultative status with the United Nations Economic and Social Council. The IHRLG provides legal advice in lawsuits raising questions of international human rights and has participated as amicus before this Court in cases including Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549 (1993), Saudi Arabia v. Nelson, 113 S.Ct. 1471 (1993), and United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992).

The Allard K. Lowenstein International Human Rights Clinic of the Yale Law School [Clinic] was organized in 1991 at the Yale Law School as a faculty-supervised course under the

auspices of the Allard K. Lowenstein International Human Rights Project, a student-run organization that seeks to educate and inspire law students, scholars, practicing attorneys, and policymakers in the defense of international human rights. The Clinic is currently acting as co-counsel for the plaintiffs in several ongoing lawsuits seeking damages for violations of international law and human rights. See, e.g., Evans Paul, et al. v. Prosper Avril, No. 91-0399 (S.D. Fla. filed Feb. 28, 1991) (suit seeking damages for torture, arbitrary detention, cruel, inhuman or degrading treatment against former dictator of Haiti); Teresa Xuncax, et al. V. Hector Gramajo, No. 91-11564WD (D. Mass. filed June 6, 1991) (suit seeking damages for summary execution, disappearance, torture, arbitrary detention, and cruel inhuman or degrading treatment against former defense minister of Guatemala). During the past two terms, the Clinic was lead counsel before this Court in Sale v. Haitian Centers

Council, Inc., 113 S.Ct. 3028 and Sale v. Haitian Centers Council, Inc., 113 S.Ct. 2549, and filed briefs amicus curiae in Saudi Arabia v. Nelson, 113 S.Ct. 1471 (1993), and United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992). The important questions presented here regarding the enforceability of damages judgments for human rights violations is therefore of great interest to the Clinic and its clients.

The Center for Constitutional Rights [CCR or Center] is a tax-exempt litigation organization devoted to enforcing the U.S. Bill of Rights and the International Bill of Rights. The Center has a particular interest in enforcing the norms of international rights in United States courts. CCR was a lead counsel in the landmark case, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Claims Act, 28 U.S.C. § 1350 (1988), grants federal courts jurisdiction to hear cases seeking compensation for acts of

torture that occurred outside the United States. Since the Filartiga decision, the Center has been co-counsel on numerous seeking damages for violations of international human rights, including the cases currently being brought by amicus Clinic. The Court's decision in this case is thus of great importance to the Center and its clients.

REASONS FOR GRANTING THE PETITION

I. AS PART OF THE LAW OF THE UNITED STATES, CUSTOMARY INTERNATIONAL LAW HIGHLIGHTS THE SIGNIFICANCE OF THE FEDERAL ISSUES RAISED IN THIS PETITION

As part of the law of the United States, international customary law provides binding rules that highlight the significance of the Federal issues raised in this petition.[1] As

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[1] Federal common law has long been held to include customary international law. See The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd sub

argued below, the Canadian judgment for which Petitioner seeks enforcement arises from acts of Respondents that violate the customary international law norm of territorial sovereignty. The Florida courts' refusal to honor the judgment also breaches the duty that the United States owes Canada under international law to redress a Canadian national's injuries that occurred on U.S. territory. Finally, the decision for which Petitioner seeks review breaches the

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nom. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). In 1900, this Court observed that the law of nations "is a part of our law, and must be ascertained and administered by [our] courts . . ." The Paquete Habana, 175 U.S. at 700. Indeed, international law "became a part of the common law of the United States upon the adoption of the Constitution." Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (emphasis in original).

international norm requiring good faith dealing between treaty parties by condoning Respondent's illegal act, a condemnation that unnecessarily disrupts foreign affairs and violates the principle of federal supremacy.

II. THE BOUNTY HUNTERS VIOLATED THE TERRITORIAL SOVEREIGNTY OF CANADA AND HENCE INTERNATIONAL LAW IN KIDNAPPING SIDNEY JAFFE

A. The Canadian Court Was Correct in Awarding Petitioner a Remedy for Wrongs Done to Her by Respondents

The Florida court based its determination not to enforce Petitioner's Canadian judgment in large measure upon its condemnation of her husband as a fugitive from justice, a contemnor, and a wrongdoer who must be prevented from profiting by his wrong. This view, said the court, barred his wife's recovery, even though his forcible return from Canada by Respondents "was wrongful in Canada's eyes." Pet., at A-13.

Transborder kidnapping is wrongful, not only "in Canada's eyes," but also in international law and hence in the law of the United States. It cannot cavalierly be

dismissed with a wink and a nod. Moreover, the specifically Federal character of the wrong -- and the potential consequences for the Federal Government if such wrongs go unredressed -- mandate the intervention of this Court.

It should be noted at the outset that review of this case and decision on the merits in favor of Petitioners would not require overruling or narrowing of United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992). The question in Alvarez was not the wrongfulness of international kidnapping. To the contrary, the Court conceded that it "may be correct that respondent's abduction was "shocking" . . . and that it may be in violation of general international law principles. Id. at 2196. In Alvarez, the much more limited question was whether the prohibition of such conduct was part -- implicitly or explicitly -- of a particular legal instrument, the U.S.- Mexico Extradition Treaty. This Court held that it was not, and thus that the "fact of respondent's forcible

abduction does not . . . prohibit his trial in a court in the United States for violations of the criminal laws of the United States." Id. at 2197.

Here, Petitioner does not seek to have Respondent's conduct measured against any particular international treaty. The measuring has already taken place. Ms. Jaffe's Ontario judgment incorporates an adjudication that she was wronged by the Respondent's conduct, and that those wrongs entitle her to a remedy in money damages. Nor is the question whether Jaffe's forcible abduction prohibited a U.S. criminal trial. Rather, the question is whether U.S. courts should give recognition to a duly entered Canadian judgment, granted in accordance with due process and Canadian law. Even were her husband's illegal conduct proved,[2]

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[2]/ While amici take no position on the merits of Mr. Jaffe's ongoing legal disputes with the State of Florida, one cannot help but notice numerous inaccuracies in the court

Petitioner should be entitled to damages for the injury done to her by Respondents' illegal acts.

By refusing to recognize and enforce the Canadian judgment, the Florida court inexplicably ignored this Court's express pronouncement that a person forcibly abducted from a foreign country by private citizens to stand trial in the United States may recover civil tort damages from his abductors. In Ker v. Illinois, 119 U.S. 436 (1886), this Court held that a U.S. citizen kidnapped in Peru by a Pinkerton agent could be tried in this country despite the fact that the abduction was illegal. The Court took pains, however, to emphasize that its holding did

> not leave the prisoner . . . without

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of appeals' decision. To cite but one example, the court describes Sidney Jaffe as a fugitive from justice for failing to appear in a Florida courtroom, when at the time Mr. Jaffe was testifying against his kidnappers in Canada.

> remedy for his unauthorized seizure [because he could sue the Pinkerton agent] in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action.

Id. at 444, see United States v. Matta-Ballesteros, 700 F.Supp. 528, 530 (N.D. Fla. 1988) (in Ker the Supreme Court "pointed out that the defendant could sue his abductor for damages").

Thus, while Ker is often cited for the proposition that criminal jurisdiction may be asserted over a defendant no matter how he or she is brought before the court, Ker itself also supports the right of Ms. Jaffe to enforce her Canadian judgment against Respondents. The Florida court clearly acted contrary to Ker when it refused to recognize and enforce that judgment.

B. The Forcible Abduction of a Person From Another Nation Constitutes a Tort in Violation of the Law of Nations

The illegality of Respondents' conduct in international law is established. That

illegality entails, as a matter of logic, illegality under United States law, since international law is part of the law of the United States. See supra at note 1.

The forcible abduction of Mr. Jaffe from Canada constituted a tort in violation of the law of nations. In addition, even though the kidnapping was perpetrated by private individuals, their conduct violated the "law of nations" because it (1) was contrary to standards, rules or customs affecting the relationship between states used by those states for dealings among themselves, and (2) infringed upon the sovereignty of a foreign nation.

The law of nations encompasses "standards by which nations regulate their dealings with another." Cohen v. Hartman, 634 F.2d 318, 319 (5th Cir. 1981). An act committed by one or more individuals may constitute a tort in violation of the law of nations if it (1) violates "'those standards, rules of customs (a) affecting the relationship between states or

between an individual and a foreign state, and (b) used by those states for their common good and/or dealings inter se,'" and (2) "impinges upon a nation's exercise of its sovereignty." Id. (citation omitted.)

In Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), the district court held that a claim against an individual for arbitrary detention constituted a cause of action for tortious conduct in violation of the law of nations, and rejected as "unsupported" the defendant's contention that international law extends only to relations between sovereign states.[3]

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[3]/ Upon reconsideration, the court extended its ruling to hold that the tort of "causing disappearance" also violated the law of nations. Forti v. Suarez-Mason, 694 F.Supp. 707 (N.D. Cal. 1988).

It has long been recognized that international law may govern the conduct of private individuals. See Respublica v. De Longchamps, 1 Dall. 111, 115-6, 1 L.

Ed. 59 (1784) (by "threatening and menacing bodily harm and violence to . . . [the] Secretary to the Legation from France," the defendant -- a private individual -- violated "the Law of Nations"); The Flick Case, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1192 (1952) ("[i]nternational law, as such binds every citizen just as does ordinary municipal law"); 1 Hyde's International Law § 11A at 33, 34 (2d rev'd ed. 1945) ("The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may clothe a State with the privilege of punishing the offender, or impose upon it the obligation to endeavor to do so. The offender may be a

Id. at 1540-42.

The bounty hunters' abduction of Mr. Jaffe, at Respondents' behest similarly qualifies as a tort in violation of the law of nations. The abduction contravened "standards, rules or customs affecting the relationship between states" and used by those states for dealings among themselves. Furthermore, the international nature of the kidnapping violated the sovereignty of Canada, to which Canada has objected strenuously and continuously.

The conclusion that the abduction of Mr. Jaffe by Respondents contravened "standards, rules or customs affecting the relationship between states" is borne out by a look at the rules used by those states for dealings among themselves. Courts in the United States have recognized that "international law does not

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private individual; and when he is subjected to the imposition of a penalty, he comes into close contact with the law of nations").

permit one nation forcibly to remove an individual from another." E.g., United States v. Verdugo-Urquidez, 939 F.2d 1341, 1352 (9th Cir. 1991), vacated, 112 S.Ct. 2986 (1992). In United States v. Toscanino, 500 F.2d. 267 (1974), the Second Circuit expressly acknowledged the "long-standing principle of international law that abductions by one state of persons located within the territory of another state violate the territorial sovereignty of the second state." 500 F.2d at 278 (emphasis added).

The bounty hunters' abduction of Mr. Jaffe from Canada unquestionably infringed upon the sovereign interest of Canada in protecting its citizens, and Canada has so noted in its objections. U.S. courts have had no difficulty in reaching this conclusion in cases involving the same facts as those in the case under petition. See Kear v. Hilton, 699 F.2d 181, 184 (4th Cir. 1983) (a U.S. bail bondsman's abduction of Mr. Jaffe, a Canadian citizen, from

Canada resulted in "the sovereignty of a foreign power [being] infringed"). The right of the victims of such a tort to compensation should be upheld.

III. THE REFUSAL OF THE FLORIDA COURTS TO ENFORCE PETITIONER'S CANADIAN JUDGMENT BREACHES A DUTY TO REMEDY THAT THE UNITED STATES OWES CANADA UNDER INTERNATIONAL LAW

The United States has an Extradition Treaty with Canada, Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, just as it has with Mexico, Treaty on Extradition, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059. In Alvarez-Machain, this Court held that the United States may exercise criminal jurisdiction over a person brought into the United States by a means (e.g. kidnapping) not contemplated by the Treaty, even if that means was illegal when and where carried out. 112 S.Ct. 2188 (1992). That is, the irregularity of the method by which a defendant was brought before a court does not defeat the court's ability to try him.

Alvarez does not expressly address the question whether the abducted foreign national

might have a private right of action against his kidnappers. But its reference to Ker v. Illinois would seem to suggest that the kidnapped individual does have such a right. In Ker this Court rejected Ker's objection to jurisdiction in part because "[t]he party himself could . . . sue . . . in an action of trespass and false imprisonment . . . " 119 U.S. at 425.[4]

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[4] Even if a public policy argument might be constructed in favor of denying the right to sue to an abductee ultimately convicted of criminal behavior in a U.S. jurisdiction, that would not apply to Mr. Jaffe. Although the court below suggests that Jaffe's acquittal rested on some kind of technicality, Pet. at A-4, the fact remains that the same court overturned Jaffe's original conviction, thus vindicating his wife's right to sue. In fact, no court in Florida or elsewhere has found Mr. Jaffe guilty of the land fraud

Canada has a right in international law to the cooperation of the United States in enforcing the Treaty, including enforcement in damages for violations by private parties. This right is trampled by the judgment review of which is now sought.

The State of Florida is obligated to provide victims of breaches of international human rights law the ability to obtain civil tort damages from those private U.S. citizens responsible for the violation. As reflected in § 701 (b) of the Restatement (Third) of Foreign Relations Law of the United States, governmental

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charges first levelled against him, but for a trial judgment later reversed on appeal. In such a case, the suggestion that a judgment in tort be enforced by his wife against the kidnappers who brought him into the jurisdiction, where he was incarcerated for months before his conviction was set aside, is anything but offensive.

entities are required to "respect the human rights of persons" which nations "generally are bound to respect as a matter of customary international law." See Restatement (Third) of Foreign Relations Law of the United States § 701 cmt. e. (1986) ("[t]he United States is bound by the international customary law of human rights").

The Restatement also provides:

> A state is also responsible if it fails to provide an alien remedies for injury to person or property, whether inflicted by the state or by private persons in circumstances in which a remedy would be provided by the major legal systems of the world.

Restatement (Third) of Foreign Relations Law of the United States § 711 cmt. e. (1986) (emphasis added); see also Restatement (Third) of Foreign Relations Law of the United States § 711 reporters' note 1 (1986) ("[i]t is wrong under international law for a state to deny a foreign national access to domestic courts"). Accordingly, the State of Florida was obligated to permit Ms. Jaffe to enforce her judgment

against Respondents for the international kidnapping of her husband.

IV. THE FLORIDA DECISION BREACHES THE INTERNATIONAL CUSTOM OF GOOD FAITH DEALING BETWEEN TREATY PARTIES BY CONDONING RESPONDENTS' ILLEGAL ACTS

The Florida courts' refusal to honor the Petitioner's Canadian judgment breaches the international norm requiring good faith dealing between treaty parties by condoning respondents' illegal acts. As a matter of customary international law, which is part of the law of the United States, see supra at note 1, states are obligated to refrain from committing acts calculated to defeat the object and purpose of treaties to which they are party. It is a cardinal principle of customary international law that "a treaty in force is binding upon the parties and must be performed by them in good faith." I. Brownlie, Principles of Public International Law 616 (4th ed. 1990). This rule of pacta sunt servanda has been a cornerstone of international law since its earliest origin and "has acquired great importance for the stability

and development of international relations as instruments of peace and as mechanisms for settlement of disputes or relaxation of tensions." P.K. Menon, The Law of Treaties Between States and International Organization 56 (1992).

The principle at stake here is much the same as its domestic contract law counterpart. One commentator has stated:

> Good faith in contractual relations thus implies the observance by the parties of a certain standard of fair dealing, sincerity, honesty, loyalty, in short, of morality throughout their dealings...International law applies this standard in treaty relations between States...much as municipal law in contractual relations between individuals.

B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 119 (1953), reprinted in International Law and World Order 792 (B.H. Weston ed., 1980).

Conventional agreements have recognized the force of the international norm mandating good faith conduct among treaty parties. The Vienna

Convention on the Law of Treaties[5] notes the pacta sunt servanda rule in its Preamble and defines its contours in two articles. Article 18 states that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty;" article 26 provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

In like manner, the International Court of Justice has consistently recognized the impact of the good faith rule governing treaty parties'

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[5] The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Although the United States is not a party to the Vienna Convention, the treaty, ratified by 74 States, reflects an international consensus. The Vienna Convention is primarily a codification of customary norms of international law.

conduct. In the Nicaragua case, the World Court relied on the principle that a State has a legal obligation "not to impede the due performance of any treaties entered into by them." Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, 135. The Court reasoned that the United States violated the customary rule by committing acts that were calculated to deprive the Treaty of Friendship, Commerce and Navigation between the United States and the government of Nicaragua of its object and purpose. Id. at 148. See also Nuclear Test Cases (Australia v. France), 1974 I.C.J. 253, 268; and Nuclear Test Cases (New Zealand v. France), 1974 I.C.J. 457, 473 (good faith requires adherence to unilateral commitment not to test).

The Restatement of Foreign Relations Law of the United States reiterates the principle, stating that "[e]very international agreement in force is binding upon the parties to it and must be performed by them in good faith."

Restatement (Third) of Foreign Relations Law of the United States § 321 (1986). Section 325 of the Restatement mandates that "[a]n international agreement is to be interpreted in good faith . . ." Id. § 325.

In keeping with the Restatement, U.S. courts have recognized the customary rule of pacta sunt servanda as a framework for interpreting the treaty obligations of the United States. In United States v. Rauscher, 119 U.S. 407 (1886), the Supreme Court emphasized the good faith with which extradition treaties are to be read. The Rauscher Court held that a prisoner could not be charged for a crime never presented to the extradition judge under the Webster-Ashburton Treaty, stating that to do otherwise would violate the "manifest scope and object of the treaty." Id. at 422. See also Tucker v. Alexandroff, U.S. 424, 437 (1901) (the convention under review "should be interpreted in a spirit of uberrima fides, and in a manner to carry out its manifest purpose.")

Although it has been held that an extradition treaty is not violated by conduct that is solely of private individuals, this rule does not apply where a government sponsors or condones the actions. In Jaffe v. Smith, 825 F.2d 304 (1987), prior to the Florida court of appeals' ruling, the Eleventh Circuit held that Mr. Jaffe's abduction from Canada would have constituted a violation of the U.S.-Canada Extradition Treaty if governmental actors were involved, that is, if the government conducted or condoned his removal by means other than those outlined in the Treaty. Id. at 308 (emphasis added). "Condonation" is defined as "an implied pardon of an offense by treating the offender as if it had not been committed." Webster's Ninth Collegiate Dictionary 274 (1988). By refusing to recognize and enforce the Canadian judgement against the appellees, the Florida court clearly "condoned"

Respondents' role in the abduction of Mr. Jaffe.[6]

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[6]/ Furthermore, that an extradition treaty does not give private citizens a private cause of action for violation does not mean U.S. citizens are free to flout its prescriptions. Article VI, Clause 2, of the U.S. Constitution states that "all Treaties . . . shall be the Supreme Law of the Land." U.S. citizens are therefore bound by a treaty's proscriptions. See, e.g., Volkswagenwerk-Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (the Hague Service Convention imposes on private U.S. citizen obligations for the service of process abroad); In re Aircrash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982) (the Warsaw Convention -- a treaty which limits the amount of liability of air carriers for accident or loss -- applies to private individuals seeking damages caused by a plane crash); cf. Hilton v.

Consequently, the Florida decision has participated in a violation of the extradition treaty by effectively permitting circumvention of the treaty by private parties. Such action on the part of a State court should not and can not be countenanced in our Federal system of Government. The fact that this international law violation is being committed by a state of the union is particularly egregious because it violates the principle of federal supremacy. See U.S. Const. art. VI. The violation of international law by the state courts unnecessarily disrupts foreign affairs and the

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Guyot, 159 U.S.113 (1895) (treaties provide a "most certain guide" for the application of international law to questions "concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation") (159 U.S. at 163, emphasis added).

comity owed to foreign nations. This Court held in Zschernig v. Miller, 389 U.S. 429 (1968), that this "kind of state involvement in foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government. [State] regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior Federal policy. Yet even in the absence of a treaty, a state's policy may disturb foreign relations." This court should not, through denial of certiorari, effectively condone such a state intrusion into foreign affairs, especially when it has not heard from the US Government on this question.

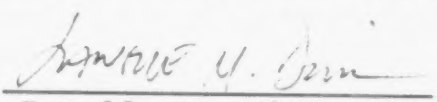
V. CONCLUSION

For all of the foregoing reasons, amici curiae respectfully submit that the writ of certiorari should issue. Amici will thereafter seek leave to expand upon these and related arguments in urging this Court to reverse and

remand the judgement under review.

Given the foreign affairs implications of the issues presented in this case, its significance for reciprocal enforcement of U.S. judgments, and the high level of interest shown by several successive administrations of the Executive Branch of the U.S. Government (see, e.g., Pet. at 3-7, A-48 - A-51) and the Canadian Executive and Parliament, the Court may wish to call for the views of the Solicitor General before final action on the petition.

Respectfully submitted,



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No. 93-241

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

vs.

HARDY M. SNOW, JR. and
ACCREDITED SURETY & CASUALTY COMPANY, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
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OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

vs.

HARDY M. SNOW, JR. and ACCREDITED SURETY & CASUALTY COMPANY, INC.,
Respondents.

Petition For A Writ of Certiorari To The District Court of Appeal Of The State of Florida, Fifth District

REPLY BRIEF FOR PETITIONER

The Petition is based on the incontrovertible fact that the enforcement of Mrs Jaffe's Canadian judgment in the Florida courts is required both by the national interests and the international legal obligations of the United States.[1] The

[1] Because the issues in this Petition implicate international obligations owed by the United States to Canada, Petitioner urges this Court to request the views of the United States Government before deciding it.

question presented is whether the Supremacy Clause of the United States Constitution permits Florida to subvert these interests and obligations by condoning Respondents' kidnapping of Sidney Jaffe from Canada, and by immunizing Respondents from the enforcement of Petitioner's judgment to compensate her for these illegal acts..

The Florida courts completely ignored these issues in refusing to enforce Petitioner's judgment. And Respondents ignore them in their Opposition.[2]

The Florida courts in this case have created a renegade state foreign policy regarding transborder abductions in direct and irreconcilable conflict with the legal obligations the United States owes to Canada. Florida's lawless hostility to the enforcement of Petitioner's valid judgment against Respondents undermines not only United States foreign policy but also the joint undertakings agreed upon by the United States and Canada. By providing Respondents with a blanket immunity from Petitioner's judgment the Florida courts violated both the national undertaking the United States has made to Canada to deter transborder abductions and the Supremacy Clause of the Constitution.

This Court is the only remaining forum in which the national interests in effective deterrence of transborder kidnappings can be vindicated and the breach of this nation's international obligations to Canada can be avoided. This Court should grant the Petition to ensure that these interests, which

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[2] Respondent's Opposition is replete with invective and lengthy recitations of the procedural history of other litigation unrelated to the pending Petition. Petitioner will not offer a point by point response to the many misstatements in the Opposition. Sidney Jaffe has been the victim of a vindictive prosecution in Florida; however, the issues involved in the underlying prosecution of Mr. Jaffe do not affect Petitioner's right to enforce her judgment against respondents for their wrongful conduct.

would be advanced by the enforcement of Petitioner's judgment below, are not thwarted.

I. THE FLORIDA JUDGMENT CONFLICTS WITH INTERNATIONAL LEGAL OBLIGATIONS OWED BY THE UNITED STATES TO CANADA AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

It is obvious that the Florida courts simply refused to accept the supremacy of the national commitments made to Canada that require enforcement of Petitioner's judgment. Instead, they directly subvert those commitments. This fact is underscored by the incredible statement by the trial court that only "Florida common law principles of judicial comity" were implicated in this case. [Opp. Cert. App. 4]. Such a direct challenge to federal authority contravenes the Supremacy Clause.

The international legal obligations of the United States are reflected, in part, in a formal Exchange of Letters between the United States and Canada arising out the Jaffe kidnapping. *Amicus Curiae* Brief of the Government of Canada ("Can. Br."), Appendix B.[3] The United States has agreed to cooperate to deter transborder kidnappings of the kind practiced by Respondents in this case. The Supremacy Clause of the United States Constitution requires the Florida courts to implement this undertaking. *United States v Pink*, 315 U.S. 203 (1942).

The decision below also breaches the duty owed by the United States to Canada under customary international law to redress Petitioner's injuries suffered as a direct result of

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[3] The Exchange of Letters was an integral part of the negotiations of a Protocol to the United States and Canada that included a number of matters of concern to both governments. [Pet. A-42].

Respondents' illegal invasion of Canada's territorial sovereignty.[4] *Kear v Hilton*, 699 F. 2d 181, 184 (4th Cir. 1983). As the Third Restatement of the Foreign Relations Law of the United States ("Third Restatement") provides:

> A state is also responsible if it fails to provide an alien *remedies* for injury to person or property, whether inflicted by the state *or by private persons* in circumstances in which a remedy would be provided by the major legal systems of the world.

Section 711 cmt. e. (1986)(emphasis added). The Third Restatement further provides that "[i]t is wrong under international law for a state to deny a foreign national access to domestic courts." section 711, Reporters' note 1.

Sidney Jaffe's kidnapping circumvented the United States-Canada Extradition Treaty.[5] Treaty on Extradition, May 4, 1971, U.S.-Can., 27 U.S.T. 983. Florida prosecutors

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[4] It is beyond argument that sending bounty hunters into the territory of another country to obtain a criminal suspect violates international law and United States policy. [Can. Br. 4-6]. See also Amicus Curiae brief of Canadian Helsinki Watch, at 5-8.

[5] This Court's decision in *United States v Alvarez-Machain*, 112 S. Ct. 2188 (1992) is not to the contrary. In *Alvarez* this Court found that a criminal defendant could not contest the personal jurisdiction of a federal court on the ground that the United States-Mexico Extradition Treaty was violated when he was kidnapped by U.S. agents. This Court did not find that such kidnappings were permitted under international law or that damages were not available for them. Nor did this Court consider the issue of whether the United States-Canada Extradition Treaty, with its independent negotiation history, prohibited the kidnapping of suspects from Canadian territory, as the government of Canada asserts in its *amicus curiae brief*. [Can. Br. 4].

sought his extradition under the Treaty but these attempts were rejected by the Governor of Florida. There is no evidence that Canada would have refused extradition.[6] [Pet. App A-38] Instead, Respondents took the law into their own hands by kidnapping Mr. Jaffe, after the lawful process provided for under the United States-Canada Extradition Treaty had been refused, creating an international incident requiring negotiations between the United States and Canada at the highest levels of government. These negotiations led to the undertakings the United States made to Canada to cooperate to deter such kidnappings, undertakings ignored by the Florida courts below when they refused to enforce Petitioner's judgment.

There is no question that both the United States and Canada viewed this kidnapping as a wrongful act, notwithstanding the Florida Court of Appeal's apparent belief that only Canada takes this view. [Pet. App A-13] The United States-Canada Extradition Treaty specifically provides for the extradition of persons involved in such kidnappings. Mr Jaffe's kidnappers were extradited to Canada, with the full support of the United States government, to stand trial for the kidnapping and they were convicted of this crime.[7]

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[6] Respondents now claim that the reason that the Governor of Florida rejected two applications for Sidney Jaffe's extradition is that the crimes were not extraditable. [Resp. Br. at 12]. The record does not support this position. In any event, even if the crimes were not extraditable this would not authorize Respondents to kidnap Mr. Jaffe from Canadian territory or the Florida courts to grant Respondents immunity from civil liability for their illegal acts.

[7] The public policy of the United States is also reflected in 18 U.S.C. 1201 which imposes federal criminal penalties for the acts committed by respondents' agents in Canada. *See United States v de la Rosa*, 911 F. 2d 985 (1990), *cert. den.*, 111 S.Ct. 2275 (1991).

Petitioner's judgment compensated her for the expenses she incurred[8] as a result of Respondents' illegal acts in kidnapping Sidney Jaffe from Canadian territory. The Canada-United States Letter of Understanding exchanged as a result of the kidnapping in this case represents the policy of the United States and an undertaking to Canada to cooperate in deterring transborder abductions like the one that is the foundation of Petitioner's compensatory judgment.

Florida's failure to enforce Petitioner's judgment flies in the face of this country's commitment to Canada and undermines the good faith implementation of the United States-Canada Extradition Treaty.[9] The immunity granted to respondents by the Florida courts officially condones these wrongful acts and therefore subverts the international obligations of the United States in violation of the Supremacy Clause.

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[8] Respondent's continue to characterize Petitioner's damages as being for "loss of consortium. [RB, at 24]. Petitioner's Canadian Judgment is based on the actual expenses she incurred to remedy the international law violation orchestrated by respondents. These actual out of pocket expenses are found in the record of this case. *See* Affidavit of Ruth Jaffe, June 6, 1991, Exhibit "B."

[9] *See Amicus Curiae* brief of International Human Rights Law Group, Allard Lowenstein International Human Rights Law Clinic and the Center for Constitutional Rights, at 26-35.

II. THE "PUBLIC POLICY" GROUNDS RELIED UPON BY THE FLORIDA COURTS FOR REFUSING TO ENFORCE PETITIONER'S JUDGMENT ARE IN CONFLICT WITH THE SUPREMACY CLAUSE

The primary arguments raised by Respondents and relied upon by the Florida courts below is that Sidney Jaffe should be considered a "fugitive from justice." Because the Florida courts viewed Petitioner's claims as "derivative" of Mr. Jaffe's claims the courts concluded that it is against *Florida* "public policy" to enforce Petitioner's judgment.

But the fact that Florida considered Sidney Jaffe to be a "fugitive from justice" cannot be a valid ground for refusing to enforce Petitioner's judgment.[10] This principle, if accepted, would always immunize transborder kidnappers from any civil accountability for their wrongful acts. It also flies in the face of this Court's assumption in *Ker v Illinois*, 119 U.S. 436, 444 (1886), that damage remedies are available to compensate the victims of transborder kidnappings. *See also United States v Matta-Ballesteros*, 700 F. Supp. 528, 530 (N.D. Fla. 1988).

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[10] Respondent's seek to distance themselves from the Florida Court of Appeal's reliance on Mr. Jaffe's failure to appear after he was charged with organized fraud after his original conviction was overturned on appeal in 1983. [Resp Br. at 18]. These charges were brought at a time when Canada was pursuing Mr. Jaffe's kidnappers on criminal charges, criminal proceedings in which Sidney Jaffe was the key witness. Florida never sought to extradite Mr. Jaffe on these charges even though it is clear they fall within the United States-Canada Extradition Treaty. Moreover, the statute upon which these charges were based was repealed by the Florida legislature in 1987. Thus, the Florida courts' reliance on the second set of charges in denying enforcement of Petitioner's judgment is doubly suspect. [Pet.App. A-14]

Florida's impermissible misuse of the "fugitive from justice" principle to immunize the perpetrators of transborder abductions in Florida courts thwarts important national interests of the United States. This state "policy" directly contradicts the national public policy on transborder abductions established by the federal government. It cannot stand under the Supremacy Clause.

Petitioner's judgment provides compensation for injuries caused **to her** because of a violation of international law orchestrated by respondents when they conspired to kidnap Petitioner's husband Sidney Jaffe from Toronto, Canada in September 1981[11]. Whether or not the Florida courts find these injuries to be "derivative" of Mr. Jaffe's claims under Florida law, the United States has a duty to facilitate the enforcement of Petitioner's judgment based on its international legal obligations and the specific undertakings made by the United States to Canada in this case.

The Florida courts relied on the fact that Canadian tort law is different from Florida tort law in that Florida law permits the kind of bounty hunting engaged in by respondents. [Pet. A-23]. The Florida "policy" that condones conduct is, of course, precisely the problem raised by this Petition. Such a "public policy" would violate the international legal obligations of the United States and the Supremacy Clause. *Zschernig v Miller*, 389 U.S. 429 (1968).

Nor may the Florida courts determine that the national undertaking made to Canada to deter transborder kidnappings is satisfied by the extradition and conviction of Sidney Jaffe's kidnappers. [Pet. App A-13]. Petitioner's Canadian judgment implements the United States-Canada joint commitment to deter

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[11] Respondents concede that Sidney Jaffe became a Canadian citizen at least as early as 1981. [Resp. Br. 12]. Though Respondents and the Florida courts below appear to believe that Mr. Jaffe's citizenship is significant, Respondents' conduct was illegal and violated Canada's territorial sovereignty regardless of his citizenship.

such acts. The United States-Canada agreement may not be undermined by Florida's decision to immunize respondents from civil liability. This immunity is in stark conflict with the international obligations and public policy of the United States. Florida may not adopt a more forgiving policy toward transborder abductions than federal law and policy requires without violating the Supremacy Clause of the United States Constitution. The Florida judgment below rests on the flawed view that Florida was free to refuse to enforce Petitioner's judgment for its own narrow interests without regard to national interests. For this reason the Florida judgment should not be allowed to stand.

It is not open to the states to consider that compliance with treaty obligations or customary international law to violate vague "public policy" determined by the hostile reaction of state courts to the facts of a given case. If accepted, such a principle undermines the fundamental mandate of the Supremacy Clause and would have disastrous consequences for our relations with other friendly governments.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

September 23, 1993

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 27 1994
OFFICE OF THE CLERK

No. 93-241

In the Supreme Court of the United States

OCTOBER TERM, 1993

RUTH JAFFE, PETITIONER

v.

HARDY M. SNOW, JR. AND ACCREDITED SURETY & CASUALTY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the refusal of the Florida courts to enforce petitioner's Canadian judgment conflicts with federal law or policy.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-241

RUTH JAFFE, PETITIONER

v.

HARDY M. SNOW, JR. AND ACCREDITED SURETY & CASUALTY COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner obtained a judgment against respondents, Accredited Surety & Casualty Co., Inc. (Accredited) and its President, Hardy M. Snow, Jr. (Snow), in Canada. That judgment awarded petitioner damages for the abduction of Sidney L. Jaffe (Jaffe), petitioner's husband, in Canada by agents of Accredited. Petitioner sought to enforce the Canadian judgment in the Florida courts, but those courts declined to enforce the judgment on the ground that to do so would be contrary to a public policy of the State that denies judicial relief to fugitives from justice.

1. Jaffe was charged in 1980 with 28 violations of the Florida Uniform Land Sales Practices Law. Fla. Stat. Ann. §§ 498.033(2), 498.059 (West Supp. 1993). After he was arrested, Jaffe entered into an agreement with Accredited pursuant to which Accredited posted a $137,500 bond to secure Jaffe's presence at trial. Pet. App. A3. The bond gave the surety the express right to apprehend, arrest, and surrender Jaffe to "the proper official at any time provided by law." *Ibid.*

Jaffe subsequently departed with petitioner for Canada, where he took up residence and obtained Canadian citizenship. See *Kear* v. *Hilton*, 699 F.2d 181, 182 n.1 (4th Cir. 1983). After Jaffe failed to appear for his trial, Accredited's bail bond was forfeited to the State, a warrant was issued for Jaffe's arrest, and Jaffe was charged with failure to appear, a felony under Florida law. Pet. App. A4. Accredited then secured the services of Daniel J. Kear, a licensed bondsman, and Timm Johnsen, a bounty hunter, to seize Jaffe and return him to Florida. In September, 1981, Kear and Johnsen abducted Jaffe from his apartment building in Toronto and forcibly transported him to Orlando, Florida, where he was taken into custody by state authorities. See generally *Jaffe* v. *Boyles*, 616 F. Supp. 1371, 1373-1374 (W.D.N.Y. 1985).

Jaffe was tried on the land sales charges and for his failure to appear, and he was convicted of all charges. The land sales conviction was overturned on appeal, however, because of a technical defect in the charging instrument. *Jaffe* v. *State*, 438 So. 2d 72 (Fla. Dist. Ct. App. 1983); see also *Jaffe* v. *Sanders*, 463 So. 2d 318, 319 (Fla. Dist. Ct. App. 1984). Based upon that ruling, Jaffe was released in October, 1983. Pet. App. A4-A5.[1] In the meantime, Jaffe

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[1] Jaffe's efforts while in custody to obtain an early parole release date were opposed by the Florida authorities. See *State ex rel. Boyles* v. *Florida Parole and Probation Commission*, 436 So. 2d 207 (Fla. Dist. Ct. App. 1983). In June, 1983, then-Secretary of State George Shultz filed a statement with the Florida Parole and Probation Commission,

was indicted under Florida's organized fraud statute. *Id.* at A5-A6; 1978 Fla. Laws ch. 78-210, § 1 (repealed by 1987 Fla. Laws ch. 87-382, § 2 (eff. Oct. 1, 1987)). He posted a second bond of $150,000 to secure his appearance on the organized fraud charge. Jaffe eventually returned to Canada; he again failed to appear for trial, and the second bond was forfeited. Pet. App. A5-A6.

Because Jaffe's abduction violated Canadian law, see R.S.C. 1985, c. C-46, s. 279(1)(b), the Canadian government made a formal request for the extradition of Kear and Johnsen to stand trial on kidnapping charges. The United States honored that request. See *Kear* v. *Hilton*, 699 F.2d at 183-184. Kear and Johnsen were both convicted and, on appeal, their convictions were upheld. *Regina* v. *Kear and Johnsen*, 2 W.C.B.(2d) 392 (Ont. H.C.J. May 5, 1986), aff'd as modified, 51 C.C.C.(3d) 574 (Ont. Ct. App. 1989); Resp. App. 16-19. The Ontario Court of Appeal, however, reduced their sentences to "time served" on the grounds that the convictions alone "would go a long way towards the vindication of Canada's sovereignty," and that the "gravity of the affront is mitigated by the circumstances of the offence," because Johnsen and Kear were "men of good character" while "nothing favourable * * * can be said about [Jaffe's] conduct." 51 C.C.C.(3d) at 576.[2]

In 1988, the governments of the United States and Canada agreed to a Protocol to amend the United States-Canadian Extradition Treaty. 27 I.L.M. 422 (1988) (advice and consent of Senate given, 137 Cong. Rec. S12,131-S12,132 (daily ed. Aug. 2, 1991), entered into force Nov. 26,

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urging it to grant parole to Jaffe "on the ground that his continued incarceration will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida to face the charges which resulted in his imprisonment." App. C to Brief of the Government of Canada as Amicus Curiae in Support of Petitioner.

[2] We understand that, as result of the conviction, Kear and Johnsen each served two days in jail.

1991)). That amendment replaced the Treaty's schedule of extraditable offenses with a general dual criminality provision and made other technical changes. Compare 27 I.L.M. 422 (1988) with 27 U.S.T. 983-1021 (1976). At the same time, the two governments exchanged letters evidencing certain "understandings." 27 I.L.M. 427 (1988) (Pet. App. A48-A51). In that exchange of letters, the United States agreed: (1) to recognize that transborder abduction by bounty hunters is an extraditable offense; (2) to commence extradition proceedings, upon request, against persons found in the United States who are charged with or convicted of such an offense in Canada; (3) to use its best efforts to honor Canadian requests for testimony and information pertaining to transborder abductions; (4) to cooperate to deter transborder abductions, including the use of best efforts to disseminate information concerning the exchange of letters to those engaged in business as bail bondsmen or bounty hunters; and (5) to consult promptly concerning any case of transborder abduction involving bounty hunters, including cooperation in return of the abducted person. 27 I.L.M. at 427-428 (Pet. App. A48-A49). The letters expressly provided, however, that they were "not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties." 27 I.L.M. at 428, 429 (Pet. App. A50, A51).

2. In 1985, Petitioner and Jaffe filed suit against Accredited and Snow in the Ontario courts seeking damages for Jaffe's abduction. Pet. App. A6; Resp. App. 20. Respondents sought dismissal based upon lack of personal jurisdiction and *forum non conveniens*. After that request was denied, respondents declined to defend the action, and a default judgment was entered against them. Pet. App. A6. In November, 1990, the court awarded petitioner general and special damages, prejudgment

interest, and costs. The judgment bears interest at an annual rate of 14 percent. *Id.* at A20, A27-A29.

3. a. Petitioner filed the instant suit in late 1990 to recover on the judgment. While expressing "utmost respect" for the Canadian legal system, the Florida trial court denied enforcement. Pet. App. A18-A26. Noting that recognition and enforcement of foreign judgments "depends upon Florida common law principles of judicial comity," the court held that enforcement may be denied if the "judgment is contrary to the public policy of Florida." *Id.* at A21-A22. The court cited four reasons that militated against enforcement of petitioner's Canadian judgment: (1) in contrast to Canadian law, Florida law would not consider apprehension of a bail-jumper to be tortious; (2) Florida public policy approves of the apprehension of a bond-jumper by the surety or its agent; (3) the apprehension in this case was directly the result of Jaffe's own wrongful act in breaching his agreement with Accredited, and Jaffe should not be permitted "to take advantage of his own wrong"; and (4) petitioner's claim is "solely derivative" of Jaffe's and, if petitioner were to collect, Jaffe "would stand to benefit." *Id.* at A23-A24.

b. The District Court of Appeal of the State of Florida, Fifth District, affirmed. Pet. App. A1-A15. The court noted that "Florida[,] in the overwhelming number of cases, recognizes and enforces the judgments of other nations." Pet. App. A7-A8. Relying on *Hilton* v. *Guyot*, 159 U.S. 113, 164-167 (1895), and the Restatement (Third) of the Foreign Relations Law of the United States § 482 (1987), the court emphasized, however, that enforcement of foreign judgments is a matter of "comity," and that "no jurisdiction will give comity to the judgment of another nation that offends that jurisdiction's public policy and sense of moral justice." Pet. App. A7, A8.

The court of appeal held that, had Jaffe himself sought enforcement of a Canadian judgment, "there are many public policy reasons why a Florida court would refuse to

* * * enforce" that judgment—reasons that go "far beyond" the differences between Canadian and Florida law concerning the apprehension of bond-jumpers. Pet. App. A8. The court first noted that Jaffe remains a fugitive from Florida justice, and that Florida courts, like their federal counterparts, follow a "fugitive dismissal" rule. Under the Florida rule, a fugitive from justice is not permitted to call upon the State's courts for resolution of any civil claims or criminal appeals. *Id.* at A9-A11 (citing, *inter alia*, *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam)). In addition, the court noted that Florida law does not permit a contemnor to invoke the protections of the courts unless he first purges the contempt, and that accordingly "persons who flaunt [*sic*] the orders of courts in this state will suffer their cases to be dismissed." Pet. App. A11-A13. Finally, the court adverted to Florida's "well-established public policy that our courts will not permit nor tolerate a person to benefit from his own wrongful act." *Id.* at A13. While Jaffe's abduction was wrongful, the court observed, so was Jaffe's antecedent breach of his contract with Accredited. *Ibid.*

Having concluded that Jaffe could not successfully enforce a foreign judgment in Florida, the court then concluded that petitioner should be "placed in her husband's shoes for purposes of recognition and enforcement of her judgment." Pet. App. A13. The court noted that petitioner's claim is "derivative" under state law, in that the damages she claims flow entirely from Jaffe's abduction. *Id.* at A14-A15 & n.13. Thus, petitioner's claimed loss of consortium "was in the eyes of the Florida courts a rightful loss, because [Jaffe] should have *rightfully* been separated from her while he stood trial and served time in prison after his conviction." *Id.* at A15. Similarly, "[t]he expenses of retaining counsel to defend [Jaffe] in Florida" and the expenses of visiting him in Florida "should *rightfully* have been spent, because [Jaffe] should have returned to this jurisdiction to stand trial."

Id. at A14-A15. In such circumstances, the court concluded, "[t]o allow her to collect on any of these items as 'damages' would be to reward the bondjumper." *Id.* at A15.

c. The Supreme Court of Florida denied petitioner's request for discretionary review. Pet. App. A17.

DISCUSSION

Petitioner challenges the Florida court of appeal's refusal to enforce the default judgment rendered in her favor by a trial court of Canada. Petitioner contends that the refusal to enforce that judgment violates the Supremacy Clause, because international agreements and "overriding federal interests" mandate enforcement. Petitioner also contends that the Florida court of appeal denied her due process by declining to enforce the judgment in her favor on the ground that her claims are merely derivative of her husband's. In our view, the decision below contravenes neither federal law nor any preemptive federal policy. Accordingly, review by this Court is not warranted.

1. a. Enforcement of the judgments of courts within the United States is subject to the Full Faith and Credit Clause of the Constitution, Art. IV, § 1. The Full Faith and Credit Clause, however, does not apply to foreign judgments. *Aetna Life Ins. Co.* v. *Tremblay*, 223 U.S. 185, 190 (1912). Nor does the full faith and credit statute, 28 U.S.C. 1738. Enforcement of the judgments of foreign courts is instead subject to the doctrine of "comity." In *Hilton* v. *Guyot*, 159 U.S. 113 (1895), this Court described that doctrine as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights

> of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-164. In *Hilton*, this Court eschewed an inflexible rule and enumerated various factors a court may consider in evaluating a request for enforcement of a judgment. See *id.* at 164-165, 202-203. Those factors include, *inter alia*, that there be no "other special reason why the comity of this nation should not allow [the judgment] full effect." *Id.* at 202. And, in a state proceeding like this one, the question of comity concerning enforcement of a foreign judgment initially is one of state, not federal, law. See Restatement (Third) of the Foreign Relations Law of the United States § 481, comment a (1987); *id.* § 482(2)(d); *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 580 (1908).

This Court has determined that a State may not deny enforcement of a foreign judgment if to do so would be inconsistent with the terms of an international agreement to which the United States is a party. See *United States* v. *Pink*, 315 U.S. 203, 221-234 (1942); see also *United States* v. *Belmont*, 301 U.S. 324, 327, 331-332 (1937). In such circumstances, the power of the State to refuse enforcement "must give way before the superior Federal policy evidenced by [the] treaty or international compact or agreement." *United States* v. *Pink*, 315 U.S. at 231. The Court has also determined that, even in the absence of an international agreement, a state court may not render a judgment that infringes on the federal government's exclusive right to conduct the foreign relations of the United States. See *Zschernig* v. *Miller*, 389 U.S. 429, 432-436 (1968) (holding that a state law that regulates rights of inheritance of foreign nationals on the basis of the State's approval of the foreign nation's form of government is preempted); see also Restatement (Third) of the Foreign Relations Law of the United States § 481, comment a (1987).

Petitioner's principal contention is that the decision below conflicts with the United States-Canadian Extra-

dition Treaty and with the letters exchanged between the United States and Canada in 1988, at the time of signing of the Protocol to that Treaty. Pet. 11-16. The Treaty and the Protocol, however, speak only to the process of extradition of fugitives between the United States and Canada; neither says anything about enforcement of civil judgments in the territory of the other contracting party. See 27 U.S.T. 983 (1976); 27 I.L.M. 422 (1988); Pet. App. A40-A51. The United States is not a party to any treaty with Canada providing for the recognition and enforcement of judgments.

Contrary to petitioner's claim (Pet. 11-13, 15), Secretary of State Shultz's letter undertaking "to cooperate [with Canada] to deter * * * transborder abductions," 27 I.L.M. 427 (1988) (Pet. App. A49), may not fairly be read as conferring upon petitioner a federal right to have her foreign judgment enforced in derogation of the public policy on which the Florida courts relied.[3] An individual ordinarily may invoke an international agreement to which the United States is a party only to the extent that it directly establishes an enforceable private right. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Head Money Cases*, 112 U.S. 580, 598-599 (1884). The governments of Canada and the United States explicitly agreed, however, that their exchange of letters was "not intended * * * to create or otherwise alter any rights or privileges for private parties." 27 I.L.M. at 428, 429 (Pet. App. A50, A51).

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[3] The sentence that immediately follows the undertaking "to cooperate" with Canada supports this conclusion. That sentence provides that the United States will use its "best efforts" to warn those engaged in bail-bonding or bounty-hunting that the United States opposes transborder abductions, and that U.S. abductors will be subject to extradition to, and prosecution by, Canada. 27 I.L.M. at 427-428 (Pet. App. A49). Consistent with that commitment, no similar incidents involving American bail-bonding companies or bounty hunters have occurred since Secretary of State Shultz's letter.

Nor did Florida decline to enforce the Canadian judgment based upon a policy of encouraging or condoning transborder abductions. The "fugitive dismissal" rule, upon which the Florida court of appeal principally relied in denying enforcement, does not depend for its application either on petitioner's identity as a foreign national or on the underlying right (to be free from transborder abductions) that her suit sought to vindicate.[4] So far as the State is concerned, the key point is that Jaffe has evinced such disregard for the lawful processes of the State's courts that he or his representative is not entitled to call upon those courts for resolution of any claims. There is nothing in the "fugitive dismissal" rule that conflicts with the United States-Canadian Extradition Treaty or with the understanding evidenced by the exchange of letters. Indeed, the federal courts have invoked their own supervisory authority to adopt similar rules in a variety of contexts, see, *e.g.*, *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970) (per curiam); *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203-1205 (1993), and this Court has repeatedly upheld against constitutional challenge the exercise of similar powers by state courts, see, *e.g.*, *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975) (per curiam); *Allen* v. *Georgia*, 166 U.S. 138, 141 (1897) (noting that the defendant's escape is a "contempt of [the court's] authority, to which no court is bound to submit").[5]

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[4] For example, the Florida courts would presumably have reached the same result if petitioner had been a Florida resident seeking to sue as the assignee of a debt owed by a Floridian to her fugitive husband.

[5] Petitioner also relies (Pet. 13) upon the statement submitted by Secretary of State Shultz to the Florida Parole and Probation Commission, urging it to grant parole to Jaffe on the ground that his continued incarceration "will exacerbate the already severe strain placed on the relations of the United States with Canada arising out of circumstances under which Mr. Jaffe was returned from Canada to Florida." See App. C to Brief of the Government of Canada as *Amicus Curiae* in Support of Petitioner. Petitioner contends that Secretary Shultz's letter evidences a "federal foreign policy interest" that is

b. Petitioner also contends that the decision below undermines the *Ker-Frisbie* doctrine. Pet. 14; Reply Br. 7-8. That doctrine holds that, "except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender * * * from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process." *Lascelles* v. *Georgia*, 148 U.S. 537, 543 (1893), citing, *inter alia*, *Ker* v. *Illinois*, 119 U.S. 436 (1886); see also *United States* v. *Alvarez-Machain*, 112 S. Ct. 2188 (1992); *Frisbie* v. *Collins*, 342 U.S. 519 (1952). Petitioner relies on a dictum in *Ker* to the effect that the Court's holding that abduction is not a defense to a criminal prosecution did not leave the abducted prisoner "without remedy for his unauthorized seizure." 119 U.S. at 444. That dictum, however, does not help petitioner. While *Ker* suggested that the prisoner would "probably" not be without redress because he "could sue" his abductors for damages and the facts alleged in that case "would without doubt sustain the action," it emphasized that recovery "would probably depend upon moral aspects of the case." *Ibid.* The Florida court of appeal's decision was consistent with that dictum in its reliance on Jaffe's misconduct as the reason for denying enforcement.

In addition, petitioner errs in suggesting that the Florida decision would "immunize transborder kidnappers from any civil accountability." Reply Br. 7. The Florida courts denied enforcement on the basis of Jaffe's mis-

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thwarted by Florida's refusal to enforce petitioner's judgment. See generally Pet. 13-14 & n.9; Reply Br. 2, 8-9. We have been informed by the Department of State that, in contrast to Jaffe's abduction, the question of enforcement of petitioner's civil judgment in this case does not have significant foreign policy implications. Accordingly, as applied in this case, Florida's policy neither frustrates United States policy on transborder abductions nor infringes on the constitutional authority of the Executive Branch in the field of foreign affairs.

conduct in fleeing and remaining a fugitive from justice. Similar misconduct may or may not be present in the case of future transborder abductions; indeed, it does not appear to have occurred in *Ker*, *Frisbie* or *Alvarez-Machain*. There is no reason to assume that all persons who may have a remedy of the sort referred to in *Ker*'s dictum will, like Jaffe, be fugitives from justice.

2. Petitioner alternatively contends that the Florida courts violated the Due Process Clause of the Fourteenth Amendment by burdening her fundamental right to marital association and her right of access to the courts. Specifically, petitioner claims (Pet. 17-18) that Jaffe's abduction by agents of Accredited deprived her of marital privacy, and that application in her suit of the "fugitive dismissal" rule based on Jaffe's conduct unfairly denies her compensation for her own injuries. There is a threshold question of whether petitioner adequately raised these claims below.[6] But putting that potential obstacle to

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[6] The courts below did not address the substantive due process claims that petitioner seeks to raise in this Court. When the highest state court in which review could be had fails to pass on a federal question, this Court will "assume[] that the omission was due to want of proper presentation * * *, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). Petitioner has cited nothing to rebut that presumption. Indeed, she first raised a due process argument in a petition for rehearing in the Florida court of appeal, and even then she said nothing of a right to marital privacy. Instead, she relied on "*Florida's* constitutional requirement of access to the courts" and on Florida cases, with only a passing, conclusory mention of federal principles of "due process." See Pet. Mot. for Reh'g in No. 91-1918, at 8, 12-13 (emphasis added). This Court has declined to review asserted federal claims in similar circumstances. See, *e.g.*, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77-79 (1988); *Webb* v. *Webb*, 451 U.S. 493, 495-499 (1981). In addition, petitioner has not addressed the threshold question of whether an alien who does not reside in the United States may invoke the constitutional protections on which she relies. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

one side, we do not believe that petitioner's contentions warrant review.

First, petitioner does not appear seriously to dispute that there are some circumstances in which a party is so closely aligned with another that she may be treated as if she were the other party. The concept of "privity" in the law of judgments is one manifestation of that principle. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 129-130 (1983); see generally Restatement (Second) of Judgments §§ 43-61 (1982). The Florida courts' conclusion that petitioner's claims are derivative of her husband's may be understood as an application of that general principle. Petitioner's constitutional argument essentially attacks the factual underpinnings for that conclusion in this case. See Pet. 17. She has not, however, given this Court any reason to depart from its usual deference to factual determinations in which two lower courts have concurred. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); see also *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

In any event, it does not appear that petitioner has been denied any rights protected by the United States Constitution. To the extent Jaffe's abduction deprived petitioner of "marital association" (Pet. 17), that deprivation resulted entirely from the conduct of private actors and, accordingly, it did not implicate the Fourteenth Amendment. See *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989). Jaffe's subsequent prosecution in Florida was lawful under the *Ker-Frisbie* doctrine, despite the abduction, and therefore likewise gave rise to no due process violation. A state court's judgment in proceedings to enforce a foreign judgment is subject to Fourteenth Amendment scrutiny, but in this case that state judgment did not cause the invasion of marital privacy of which petitioner complains. Nor can petitioner maintain that she was denied "access to the courts" because her suit was not successful. This Court

has never held that a State's application of neutral public policies to bar enforcement of a foreign judgment deprives the party seeking enforcement of due process of law. See, *e.g.*, *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. at 580 ("We fail to perceive how this application of a well known rule can be said to deprive the plaintiff in error of its property without due process of law").

3. Petitioner's amici contend that several international agreements or declarations mandate enforcement of petitioner's judgment. Petitioner does not herself rely on those agreements or declarations as grounds for contending that the Florida courts were required to enforce the Canadian judgment (see Pet. i), and it therefore does not appear that any claims based on those materials are properly presented for review by this Court. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). In any event, amici's arguments do not warrant consideration by this Court.

a. Amicus Canadian Helsinki Watch Group (CHWG) contends that enforcement is required by the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).[7] The Senate gave its advice and consent to the Covenant on April 2, 1992, 138 Cong. Rec. S4781 (daily ed. Apr. 2, 1992), and it entered into force in the United States on September 8, 1992. However, Congress and the Executive Branch agreed at the time of ratification that the articles of the Covenant on which CHWG relies would not be self-executing. See S. Exec.

[7] CHWG also intimates that the failure of courts in the United States to enforce petitioner's judgment might constitute a violation of the Helsinki Accords (officially entitled Conference on Security and Cooperation in Europe: Final Act), 73 Dep't of State Bull. 323 (1975). See CHWG Br. 3, 4. That argument was not raised before the Florida courts. In any event, the Helsinki Accords do not provide petitioner with legally enforceable rights. See *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 375-376 (7th Cir. 1985); *United States* v. *Kakwirakeron*, 730 F. Supp. 1200, 1202 (N.D.N.Y. 1990).

Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. at S4783-S4784. Thus, the Covenant does not provide petitioner with any legally enforceable rights.

In any event, CHWG's reliance on the Covenant is misplaced. CHWG relies principally (see CHWG Br. 9-10) on Article 9(5), which states that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." At the time of ratification of the Covenant, however, Congress and the Executive Branch agreed that the "right to compensation" referred to in that article means only "the provision of effective and enforceable mechanisms by which a victim * * * may seek and, where justified, obtain compensation," since "[e]ntitlement to compensation may be subject to the reasonable requirements of domestic law." 138 Cong. Rec. at S4783; S. Exec. Rep. No. 23, *supra*, at 8, 15-16, 22. Thus, even were it individually enforceable, Article 9(5) of the Covenant does not override otherwise-applicable domestic rules, such as the "fugitive dismissal" rule, that may preclude relief in certain circumstances.

b. CHWG also suggests that failure to enforce petitioner's judgment violates Article 8 of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. 1/777 (1948), which provides a "right to an effective remedy by the competent national tribunals" for violations of fundamental rights granted by law, as well as Article 18 of the American Declaration of the Rights and Duties of Man, O.A.S. Off. Rec. OEA/Ser.L/V/II.65, Doc. 6, at 17, 22 (1985), which permits every person to resort to the courts to ensure respect for his legal rights. CHWG Br. 10-11. Neither of those Declarations requires enforcement of a foreign judgment based upon a private tort action, and, as we have already noted, the fact that petitioner's claim fails, based on a "fugitive dismissal" rule that is equally applicable to all similarly situated domestic and foreign litigants, cannot fairly be said to deny her appropriate access to American tribunals. More important, those

Declarations do not set forth legal obligations that are individually enforceable. See *United States* v. *Terrazas-Carrasco*, 861 F.2d 93, 96-97 & n.3 (5th Cir. 1988); *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794, 816 n.17 (D.C. Cir. 1987); see also *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 818 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); 5 M. Whiteman, Digest of International Law 243 (1965).[8]

c. Several of petitioner's amici also contend that Jaffe's abduction violated customary international law and that the United States is responsible under international law if it fails to provide petitioner with a remedy. CHWG Br. 9; International Human Rights Law Group *et al.* (IHRLG) Amicus Br. 25-26; see also Reply Br. 4. They point to comment e to Section 711 of the Restatement (Third) of the Foreign Relations Law of the United States (1987), which states (at 188):

> A state is * * * responsible if it fails to provide to an alien remedies for injury to person or property, whether inflicted by the state or by private persons in circumstances in which a remedy would be provided by the major legal systems of the world.

There has been no showing, however, that "the major legal systems of the world" would enforce the Canadian judgment at the request of a fugitive from justice. In addition, the Restatement's discussion appears to be addressed to the principle of state responsibility when *agents of the state* caused the damage inflicted, either by

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[8] Decisions that have looked to the Universal Declaration of Human Rights as a statement of customary international law, see *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 716 n.15 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993); *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), modified, 694 F. Supp. 707 (N.D. Cal. 1988), involved allegations of torture and are distinguishable. The latter two cases were also brought directly under the Alien Tort Statute, 28 U.S.C. 1350, discussed at pages 17-18, *infra*.

affirmative act or, in certain circumstances, by withholding police protection. See Restatement (Third) of the Foreign Relations Law of the United States § 711 (1987) (a state is "responsible under international law for injury to a national of another state caused by an official act or omission"); see also Draft Articles on State Responsibility, Art. 7, 18 I.L.M. 1557, 1569 (1979). Jaffe's abduction was carried out by private individuals, acting under the authority of neither the State of Florida nor the United States government. See *Jaffe* v. *Smith*, 825 F.2d 304, 307-308 (11th Cir. 1987).[9]

d. Finally, amicus CHWG argues (Br. 13 n.2) that respondents' conduct may amount to a tort in violation of the law of nations within the meaning of the Alien Tort Statute, 28 U.S.C. 1350, and that the failure of the Florida courts to enforce the judgment "ignores" that federal statute. See also IHRLG Br. 16-22. Section 1350 states:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. 1350.

We see no conflict between the judgments of the Florida courts in this case and Section 1350. First, Section 1350 confers jurisdiction of certain tort suits on the federal courts; it does not speak at all to claims filed in state court. Second, even if this case had been brought in federal

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[9] *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974), relied upon by amici, is similarly distinguishable. See *id.* at 269-271. To the extent petitioner's amici contend that Florida's failure to recognize petitioner's judgment amounts to an unlawful "condonation" of the conduct of Kear and Johnsen (see IHRLG Br. 31-32; CHWG Br. 7), their argument fails on the same ground as petitioner's related argument that the judgment below encourages abductions. The Florida courts declined enforcement on the ground of Jaffe's misconduct—his continued fugitivity—not as part of any policy of approving transborder abductions.

court under Section 1350, there would be nothing inconsistent between Congress's determination to "open[] the federal courts" to civil actions by aliens based on violations of the law of nations, *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), and the refusal of the court to enforce a foreign judgment based upon Jaffe's fugitive status.

4. There is a final consideration weighing against certiorari in this case. After granting the default judgment against respondents, the Ontario Court of Justice (General Division) held a trial respecting claims that petitioner and Jaffe also asserted against respondents' co-defendants. On March 17, 1994, after the filing of the petition for certiorari in this case, that court found for the co-defendants. In doing so, the court suggested that the default judgment that petitioner seeks to enforce here may have been the result of fraud on the court:

> I have no doubt that Matlow J. [the judge who granted the default judgment] granted judgment in favour of both Jaffe and Mrs. Jaffe on the basis of misstatements or misrepresentations knowingly made to him for the purposes of furthering a scheme to promote the best interest of Jaffe before the courts and Parole Commission in Florida, and allowing a recovery of money to which neither of them are entitled. I have a serious concern about this matter and question whether the judgments of Matlow J. should now be enforced. I think the matter of their validity should be the subject of further consideration on another occasion.

Jaffe v. *Miller*, No. 85-CQ-6103 (Ont. Ct. Justice Mar. 17. 1994), slip op. 60 (Carruthers, J.). In light of this uncertainty concerning the enforceability of petitioner's judgment in the courts of Canada, any doubt about whether the Florida courts erred in declining enforcement of that judgment should be resolved against review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1994

* The Solicitor General is recused in this case.

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NO. 93-241

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RUTH JAFFE,
Petitioner,

v.

HARDY M. SNOW, JR. and
ACCREDITED SURETY & CASUALTY CO.,
INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH DISTRICT

REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner respectfully submits this Brief in Reply to the Brief of the United States as Amicus Curiae.

The United States opines that the petition for certiorari should not be granted, because it finds that the

failure of a State court in this country to accord comity to the judgment of a court of Canada does not implicate the foreign relations of the United States. That is an extraordinary proposition.

How can it be said that important questions of foreign affairs are not presented when the abduction of Sidney Jaffe from Canada to the United States provoked diplomatic intervention at the highest levels, and the Government of Canada itself has participated in this case Amicus Curiae urging that the Court grant certiorari? How can it be said that a State has the power, consistent with this Court's decision in Hilton v. Guyot, 159 U.S. 113 (1895), to deny enforcement to a judgment of a friendly

foreign nation for reasons that are ill-defined, inapplicable, and openly driven by extralegal concerns?

The United States takes issue in particular with Petitioner's invocation of this Court's venerable decision in Ker v. Illinois, 119 U.S. 436 (1886). In that opinion, the Court suggested that the victim of a transborder abduction, who may nevertheless be prosecuted in the United States, could sue his kidnapper, and the courts would "without doubt" come to his aid. 119 U.S. at 444. Nor does the United States correctly render the Ker decision when it says that this Court "emphasized that recovery 'would probably depend upon moral aspects of the case.'" Brief of

the United States, at 11, citing Ker. It was not recovery, but the amount of recovery, that the Court said would depend on "moral aspects."

That an abducted prisoner, illegally brought across international borders to stand trial, could sue his kidnappers and win, this Court did not doubt. Nor has any decision of the Court since Ker in 1886 given reason to think that such was not the law of the land.

The State court decision to be reviewed in the case at bar challenges this Court's conclusion in Ker: a conclusion that was no mere "dictum," as the United States would have it, but an important part of the justification of an otherwise anomalous result:

authorization for the prosecution of a person whose presence in the jurisdiction to stand trial was itself procured in violation of law.

Finally, the United States cites out of context a paragraph from the decision of a Toronto trial court judge in a proceeding related to the one whose enforcement is sought here, to create the inference that Petitioner's judgment is somehow questionable, or tainted, or not final. Brief of the United States, at 18, citing Jaffe v. Miller, No. 85-CQ-6103 (Ontario Ct. Just., March 17, 1994)(Carruthers, J.). There is, however, in Canadian law or procedure no "uncertainty concerning the enforceability of Petitioner's judgment

in the courts of Canada." Id.

Petitioner's judgment is final and binding. The case before Carruthers, J., was not an appeal from the decision Petitioner brought to Florida for enforcement. These Respondents did not even participate in it.

Carruthers, J., evidently differed from Matlow, J. (of the Toronto court which awarded Petitioner her judgment), a judge in a sister and not a higher court, in his assessment of the evidence in a case not before him. But this does not create "uncertainty" about the finality or enforceability of Petitioner's judgment in Canada, a country whose judicial system, like our own, provides dissatisfied litigants

with the right to appeal from adverse judgments, and fora in which to do it.

For all of these reasons, the arguments against the grant of certiorari raised by the United States as Amicus Curiae should be rejected, and as Petitioner has previously argued, the writ should issue.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.7 of the Rules of the Court, petitioner submits this supplemental brief to call to the Court's attention the decision of the House of Lord's in Bennet v. Horseferry Road Magistrates' Court, [1994] A.C. 42, [1993] 3 All E.R. 138, which was not available at the time

of petitioner's last filing, and which is relevant to the international law question that is present in this case. A copy of that decision is reproduced in Appendix A to this brief; a copy of the decision and judgment entered on remand by the Divisional Court is reproduced in Appendix B.

1. The immediate question before the Court on this petition for certiorari is whether a Florida State court below was free to refuse to enforce a Canadian civil judgment against the respondent bonding company that had arranged for petitioner's husband to be abducted in Canada and forcibly returned to this country in blatant violation of Canadian and international law. The Florida court declined to enforce the judgment on purely local public policy grounds, holding in essence that the petitioner's claims were tainted because they arose out of her husband's wrongdoing in jumping bail in Florida.

The court was unconcerned whether customary international law -- which forms a part of federal substantive law, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) -- had a bearing on this unprecedented judgment enforcement case.[1]

2. Petitioner and the Government of Canada's amicus brief in this Court urge that customary international law is directly relevant to the judgment enforcement issue here presented. This Court has from its very first term stressed that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations." Chisholm v. Georgia, 2 Dall. 419, 474 (1793).

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[1] The court was aware of the decade-long deleterious effect that petitioner husband's abduction had had on U.S./Canadian relations. The Government of Canada had not only filed amicus curiae briefs in the Florida courts, but at one point the Government of Canada even went to the extraordinary extent of seeking, as parens patriae, habeas corpus relief on behalf of the husband.

Two years later, the Court condemned the conduct of American citizens in attacking and taking on the high seas goods of friendly foreign nations as "a violation of our own law, I mean the common law, on which the law of nations is part." Talbot v. Janson, 3 Dall. 133, 161 (1795)(per Iredell, J.). And almost a century ago, in invalidating the wartime seizure of private fishing vessels as a violation of the law of nations, the Court -- in a passage known to every law student -- emphatically confirmed the power of courts to enforce established principles of customary international law at the behest of a private party when it stated that "international law is part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900). Count-

less other decision have reiterated this rule since.

3. The Court has not had occasion to address the question whether transborder abductions constitute a violation of established norms of international law,[2] and whether the law provided a private remedy for the tort of abduction.[3]

We believe the attached opinion of the House of Lords to be of such extraordinary significance to the progressive development of the rule of law in international relations as to warrant being

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[2] Two terms ago, in United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992), the Court pretermitted the question, and resolved the transborder abduction there involved exclusively under the U.S./Mexican extradition treaty.

[3] The Court suggested over a century ago in Ker v. Illinois, 119 U.S. 436, 444 (1886) that such a remedy would be available.

In his concurring speech in Bennett, supra (at 155, lines g-h), Lord Bridge of Harwich confirmed the existence of a civil remedy, but considered it alone to be a "wholly inadequate" response to lawless abductions.

called to this Court's attention. In Bennett, four of the five sitting law Lords overturned over a century and a half of English precedents and held that the maintenance of the rule of law must prevail over the public interest in the prosecution and punishment of offenders where an offender is forcibly brought into the jurisdiction in disregard of extradition procedures available for his return. It is notable that the leading 19th century English case on which this Court relied a century ago in Ker v. Illinois, 119 U.S. at 424, in adopting the rule that abduction is not a defense to criminal prosecution -- Ex parte Scott, 9 Barn. & C. 446 (1829) -- has now been disapproved by the House of Lords.

In considering the petition for certiorari in this case, we respectfully commend to the Court the House of Lord's penetrating analysis of the development of

customary international law in transborder abductions since the Court last spoke to the issue in Ker a century ago.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Bennett v Horseferry Road Magistrates' Court and another

HOUSE OF LORDS

LORD GRIFFITHS, LORD BRIDGE OF HARWICH, LORD OLIVER OF AYLMERTON, LORD LOWRY AND LORD SLYNN OF HADLEY

3, 4, 8, 9 MARCH, 24 JUNE 1993

Extradition – Disguised extradition – Deportation to United Kingdom – Applicant arrested in South Africa and put on aircraft bound for England – Applicant arrested on arrival in England and charged – Applicant alleging that he was brought within jurisdiction by improper collusion between South African authorities and English police – Whether alleged collusion between South African authorities and English police amounting to abuse of process of court – Whether court having power to inquire into circumstances in which applicant brought within jurisdiction.

Criminal law – Committal – Preliminary hearing before justices – Abuse of process – Power of justices – Justices having power to refuse to commit for trial on grounds of abuse of process in matters directly affecting fairness of trial – Extent of power – Whether appropriate for justices to decide questions involving deliberate abuse of extradition procedures – Whether proper court to decide such matters is Divisional Court.

The appellant, a New Zealand citizen, was alleged to have purchased a helicopter in England in 1989 by a series of false pretences and then to have taken it to South Africa. In November 1990 he was arrested in South Africa. The English police, who wished to arrest him, were informed but in the absence of an extradition treaty between the United Kingdom and South Africa no proceedings for the appellant's extradition were ever initiated. Instead, the appellant was put on an aircraft bound for London by the South African police and when he arrived in England on 28 January 1991 he was arrested. He was subsequently brought before magistrates who committed him to the Crown Court for trial. The appellant sought judicial review of the magistrates' decision to commit him for trial, claiming that he had been forcibly returned to England against his will and brought within the jurisdiction as a result of disguised extradition or kidnapping. He alleged that the South African police had indicated that he would be repatriated to New Zealand but had then arranged with the English police that he would travel via England to enable him to be arrested and tried in England. He contended that the subterfuge and complicity between the English police and the South African police to obtain his presence within the jurisdiction to enable him to be arrested amounted to an abuse of the process of the court and that it would be wrong and improper for him to be tried in England. The Divisional Court held that, even if there was evidence of collusion between the English police and the South African police in kidnapping the appellant and securing his enforced illegal removal from South Africa, the court had no jurisdiction to inquire into the circumstances by which he came to be within the jurisdiction and accordingly dismissed his application for judicial review. The appellant appealed to the House of Lords.

Held (Lord Oliver dissenting) – The maintenance of the rule of law prevailed over the public interest in the prosecution and punishment of crime where the

prosecuting authority had secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him or having him abducted from within the jurisdiction of some other state in violation of international law, the laws of the state from which he had been abducted and his rights under the laws of that state and in disregard of available procedures to secure his lawful extradition to the jurisdiction of the court from the state where he was residing. It was an abuse of process for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom and the High Court had power, in the exercise of its supervisory jurisdiction, to inquire into the circumstances by which a person was brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures by a process to which the police, prosecuting or other executive authorities in the United Kingdom were a knowing party the court could stay the prosecution and order the release of the accused. The appeal would therefore be allowed and the case remitted to the Divisional Court for further consideration (see p 150*e* to *h*, p 151*cd*, p 152*hj*, p 155*e* to p 156*a*, p 160*h*, p 162*e*, p 162*j* to p 163*a*, p 163*g*, p 164*h* and p 169*ghj*, post).

R v Hartley [1978] 2 NZLR 199, dictum of Woodhouse J in *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 475–476, *R v Bow Street Magistrates, ex p Mackeson* (1982) 75 Cr App R 24, *S v Ebrahim* 1991 (2) SA 553 and dictum of Stevens J in *US v Alvarez-Machain* (1992) 119 L Ed 2d 441 at 466–467 applied.

R v Plymouth Magistrates' Court, ex p Driver [1985] 2 All ER 681 overruled.

Per curiam. Justices, whether sitting as examining magistrates or exercising their summary jurisdiction, have power to exercise control over their proceedings through an abuse of process jurisdiction in relation to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. In the case of the deliberate abuse of extradition procedures the proper forum is the Divisional Court and if a serious question as to such a matter arises justices should allow an adjournment so that an application can be made to the Divisional Court (see p 152*e* to *h*, p 156*a*, p 160*g*, p 166*e* and p 169*ghj*, post).

Decision of the Divisional Court [1993] 2 All ER 474 reversed.

Notes

For seizure of persons in violation of international law, see 18 *Halsbury's Laws* (4th edn) para 1534.

For committal proceedings generally, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 824–827, and for cases on the subject, see 15(1) *Digest* (2nd reissue) 139–142, *12772–12802.1*.

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R v Northumberland Compensation Appeal Tribunal, ex p Shaw [1952] 1 All ER 122, [1952] 1 KB 338, CA.
R v O/C Depot Battalion RASC Colchester, ex p Elliott [1949] 1 All ER 373, DC.
R v Oxford City Justices, ex p Smith (1982) 75 Cr App R 200, DC.
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S v Ebrahim 1991 (2) SA 553, SA App Div.
Scott, Ex p (1829) 9 B & C 446, 109 ER 166.
Sinclair v DPP [1991] 2 All ER 366, [1991] 2 AC 64, [1991] 2 WLR 1028, HL.
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US v Alvarez-Machain (1992) 112 S Ct 2188, US SC.
US v Sobell (1956) 142 F Supp 515, US DC SD NY ; *affd* (1957) 244 F 2d 520, US Ct of Apps (2nd Cir); *cert denied* 355 US 873, US SC.
US v Toscanino (1974) 500 F 2d 267, US Ct of Apps (2nd Cir).

Appeal

Paul James Bennett appealed, with the leave of the Appeal Committee of the House of Lords given on 3 December 1992, from the decision of the Divisional Court of the Queen's Bench Division ([1993] 2 All ER 474) given on 31 July 1992 refusing the appellant's application for judicial review by way of (1) an order of certiorari to quash the criminal proceedings preferred against him by the Crown Prosecution Service in the Horseferry Road Magistrates' Court on 22 May 1991

and (2) an order of certiorari to quash the order of the Horseferry Road Magistrates' Court made on 22 May 1991 committing the appellant for trial in the Crown Court at Southwark on those criminal charges. The Divisional Court had refused leave to appeal to the House of Lords but it certified, under s 1(2) of the Administration of Justice Act 1960, that a point of law of general public importance (set out at p 143*bc*, post) was involved in the decision. The facts are set out in the opinion of Lord Griffiths.

Alan Newman QC and *Brian Jubb* (instructed by *Hallinan Blackburn Gittings & Nott*) for the appellant.

Colin Nicholls QC and *Robert Fischel* (instructed by the *Crown Prosecution Service*) for the respondents.

Their Lordships took time for consideration.

24 June 1993. The following opinions were delivered.

LORD GRIFFITHS. My Lords, the appellant is a New Zealand citizen who is wanted for criminal offences which it is alleged he committed in connection with the purchase of a helicopter in this country in 1989. The essence of the case against him is that he raised the finance to purchase the helicopter by a series of false pretences and has defaulted on the repayments.

The English police eventually traced the appellant and the helicopter to South Africa. The police, after consulting with the Crown Prosecution Service, decided not to request the return of the appellant through the extradition process. The affidavit of Det Sgt Martin Davies of the Metropolitan Police, New Scotland Yard, deposes as follows:

> 'I originally considered seeking the extradition of the [appellant] from South Africa. I conferred with the Crown Prosecution Service, and it was decided that this course of action should not be pursued. There are no formal extradition provisions in force between the United Kingdom and the Republic of South Africa and any extradition would have to be by way of special extradition arrangements under section 15 of the Extradition Act 1989. No proceedings for the [appellant's] extradition were ever initiated.'

It is the appellant's case that, having taken the decision not to employ the extradition process, the English police colluded with the South African police to have the appellant arrested in South Africa and forcibly returned to this country against his will. The appellant deposes that he was arrested by two South African detectives on 28 January 1991 at Lanseria, South Africa, who fixed a civil restraint order on the helicopter on behalf of the UK finance company and told the appellant that he was wanted by Scotland Yard and he was being taken to England. Thereafter he was held in police custody until he was placed on an aeroplane in Johannesburg ostensibly to be deported to New Zealand via Taipei. At Taipei when he attempted to disembark he was restrained by two men who identified themselves as South African police and said that they had orders to return him to South Africa and then to the United Kingdom and hand him over to Scotland Yard. He was returned to South Africa and held in custody until he was placed, handcuffed to the seat, on a flight from Johannesburg on 21 February arriving at Heathrow on the morning of 22 February, when he was immediately arrested by three police officers including Det Sgt Davies. He further deposes

that he was placed on this flight in defiance of an order of the Supreme Court of South Africa obtained by a lawyer on his behalf on the afternoon of 21 February. *a*

The English police through Det Sgt Davies deny that they were in any way involved with the South African police in returning the appellant to this country. They say that they had been informed that there were a number of warrants for the appellant's arrest in existence in Australia and New Zealand and that they requested the South African police to deport the appellant to either Australia or *b* New Zealand and it was only on 20 February that the English police were informed by the South African police that the appellant was to be repatriated to New Zealand by being placed on a flight to Heathrow from whence he would then fly on to New Zealand. Det Sgt Davies does, however, depose in a second affidavit as follows:

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> '1. Further to my affidavit sworn in the above mentioned proceedings on 29 November 1991, my earliest communications with the South African authorities following the [appellant's] arrest were with the South African police with a view to his repatriation to New Zealand or deportation to Australia and his subsequent extradition from one of those countries to *d* England. I discussed with the South African police the question as to whether the [appellant] would be returned via the United Kingdom and I was informed by them that he might be returned via London. I sought advice from the Crown Prosecution Service and from the Special Branch of the Metropolitan Police as to what the position would be if he were so returned. I informed the South African police by telephone that if the [appellant] were *e* returned via London he would be arrested on arrival. Subsequently I was informed by the South African police that the [appellant] could not be repatriated to New Zealand via Heathrow ...
>
> 4. I now recollect that it was on 20 February and not on 21 February as I stated in my previous affidavit, that the South African police informed me on the telephone that the [appellant] was to be returned to New Zealand via *f* Heathrow. On the same day I consulted the Crown Prosecution Service and it was decided that the English police would arrest the [appellant] on his arrival at Heathrow.'

It is not for your Lordships to pass judgment on where truth lies at this stage of *g* the proceedings, but for the purpose of testing the submission of the respondents that a court has no jurisdiction to inquire into such matters it must be assumed that the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences *h* of dishonesty he is alleged to have committed in 1989. I shall also assume that the Crown Prosecution Service were consulted and approved of the behaviour of the police.

On 22 May 1991 the appellant was brought before a stipendiary magistrate for the purpose of committal proceedings. Counsel for the appellant requested an *j* adjournment to permit him to challenge the jurisdiction of the magistrates' court. The application was refused and the appellant was committed for trial to the Crown Court at Southwark on five offences of dishonesty. The appellant obtained leave to bring proceedings for judicial review to challenge the decision of the magistrate. On 22 July 1992 the Divisional Court ruled that as a preliminary issue the court would consider whether there was jurisdiction vested

in the Divisional Court to inquire into the circumstances by which the appellant had come to be within the jurisdiction of the courts of England and Wales.

On 31 July 1992 the Divisional Court ([1993] 2 All ER 474) held that even if the evidence showed collusion between the Metropolitan Police and the South African police in kidnapping the appellant and securing his enforced illegal removal from the Republic of South Africa there was no jurisdiction vested in the court to inquire into the circumstances by which the appellant came to be within the jurisdiction and accordingly dismissed the application for judicial review. The Divisional Court has certified the following question of law:

> 'Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction.'

The Divisional Court in this case was faced with conflicting decisions of the Divisional Court in earlier cases. In *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24 the facts were as follows. The applicant was a British citizen who had left this country at the end of 1977 and in 1979 was working as a schoolteacher in Zimbabwe-Rhodesia. In May 1979 he was wanted by the Metropolitan Police for offences of fraud that he was alleged to have committed before he left this country. The Metropolitan Police were aware that no extradition was lawfully possible at that time because the Zimbabwe-Rhodesia government was in rebellion against the Crown. The Metropolitan Police therefore told the authorities in Zimbabwe-Rhodesia that the applicant was wanted in England in connection with fraud charges, with the result that he was arrested and a deportation order made against him. The applicant brought proceedings in Zimbabwe-Rhodesia for the deportation order to be set aside which succeeded at first instance but the decision was set aside on appeal. No attempt was made to use the extradition process to secure the return of the applicant when Zimbabwe-Rhodesia returned to direct rule under the Crown in December 1979. On 17 April 1980 the applicant was placed on a plane by the police in Zimbabwe-Rhodesia and arrested on his arrival at Gatwick by the Metropolitan Police on 17 April 1980. No evidence was offered in respect of the fraud charges but further charges were alleged against him under the Theft Acts. The applicant applied for an order of prohibition to prevent the hearing of committal proceedings against him in the magistrates court on those charges.

On these facts Lord Lane CJ, giving the judgment of the Divisional Court, held, on the authority of *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373, that the court had jurisdiction to try the applicant. He said (75 Cr App R 24 at 32):

> 'Whatever the reason for the applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court. That aspect of the matter is simple.'

On the question of whether the court could or would exercise a discretion in favour of the applicant to order his release from custody Lord Lane CJ relied upon a passage in the judgment of Woodhouse J in *R v Hartley* [1978] 2 NZLR 199, a decision of the New Zealand Court of Appeal. In that case the New Zealand

police had obtained the return of a man named Bennett from Australia to New Zealand, where he was wanted on a charge of murder, merely by telephoning to the Australian police and asking them to arrest Bennett and put him on an aeroplane back to New Zealand, which they had done. Lord Lane CJ cited (75 Cr App R 24 at 32–33) the following extract from the judgment of Woodhouse J ([1978] 2 NZLR 199 at 216–217):

> 'There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised Court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith CJ referred to extradition as a "great prerogative power, supposed to be an incident of sovereignty" and then rejected any suggestion that it "could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished": *Brown v Lizars* ((1905) 2 CLR 837 at 852). The reasons are obvious. We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the Courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the Judge would probably have been justified in exercising his discretion under s 347(3) [of the Crimes Act 1961] or under the inherent jurisdiction to direct that the accused by discharged.'

Lord Lane CJ followed that passage and exercised the court's discretion to order prohibition against the magistrates' court and to discharge the applicant.

Ex p Mackeson was followed by the Divisional Court in *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108.

In *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95 a differently constituted Divisional Court, after hearing argument containing more elaborate citation of authority, declined to follow *Ex p Mackeson* and held that the court had no power to inquire into the circumstance in which a person was found within the jurisdiction for the purpose of refusing to try him.

The Divisional Court regarded the law as settled by a trilogy of cases: *Ex p Scott* (1829) 9 B & C 446, 109 ER 166, *Sinclair v HM Advocate* (1890) 17 R (J) 38 and *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373. These cases undoubtedly show that at the time they were decided the judges were not prepared to inquire into the circumstances in which a person came within the jurisdiction. In *Ex p Scott* Lord Tenterden CJ granted a warrant for the apprehension of Scott so that she might appear and plead to a bill of indictment charging her with perjury. Ruthven, the police officer to whom the warrant was directed, arrested Scott in Brussels. She applied to the British ambassador for assistance but he refused to interfere and Ruthven brought her to Ostend and then to England. A rule nisi was obtained for a habeas corpus to bring up Scott in order that she might be discharged. In giving judgment Lord Tenterden CJ said (9 B & C 446 at 448, 109 ER 166 at 167):

> 'The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them.'

In *Sinclair v HM Advocate* (1890) 17 R (J) 38 the sheriff substitute of Lanarkshire granted a warrant to a Glasgow sheriff officer to arrest Sinclair for breach of trust and embezzlement and to receive him into custody from the government of Spain. The accused was brought before the sheriff substitute on this warrant and committed to prison to await his trial. He brought a bill of suspension and liberation in which he alleged that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant, that he had been put by them on board an English ship in the Tagus and there had been taken into custody by a Glasgow detective officer without the production of a warrant, but during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours, that the complainer had demanded to be allowed to land there but had been prevented by the officer, that on arriving in London he was not taken before a magistrate, nor was the warrant indorsed, but he was brought direct to Scotland, and there committed to prison, and no warrant was ever produced or exhibited to him. It was held that these allegations did not set forth any facts to affect the validity of the commitment by the sheriff substitute, which proceeded upon a proper warrant.

In the course of his judgment the Lord Justice Clerk (Macdonald) said (at 40–42):

> 'There are three stages of procedure in this case—first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments. That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings. In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mouth of the

Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement. If there was any irregularity in the granting or execution of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong. It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of this country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the Court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the Court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here ... No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. But even if the proceedings here were irregular I am of opinion that where a Court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign Government, and irregularly dealt with by a subordinate officer.'

Lord M'Laren stated his view in the following terms (at 43–44):

'With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody ... I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction. In a case of substantial infringement of right this Court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention.'

In *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373 a deserter from the RASC was arrested in Belgium by British officers accompanied by two Belgian police officers. He was brought to this country, where he was charged with desertion and detained in Colchester barracks. He applied for a writ

of habeas corpus, which was issued, and on the return of the writ he submitted that his arrest was illegal because the British authorities had no power to arrest him in Belgium and his arrest was contrary to Belgian law. Dealing with this submission Lord Goddard CJ said (at 376):

> 'The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested." He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time that he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not entitle him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest.'

Lord Goddard CJ then reviewed the decisions in *Ex p Scott* and *Sinclair v HM Advocate* and after citing the first part of the passage in the speech of Lord M'Laren which I have already cited Lord Goddard CJ continued (at 377–378):

> 'That, again, is a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this court.'

There were also cited to the Divisional Court a number of authorities from the United States which showed that United States courts have not regarded the constitutional right to 'due process' as preventing a court in the United States from trying an accused who has been kidnapped in a foreign country and forcibly abducted into the United States (see *Ker v Illinois* (1886) 119 US 436 and *US v Sobell* (1956) 142 F Supp 515; *affd* (1957) 244 F 2d 520).

Relying on this line of authority the Divisional Court declined to follow *Ex p Mackeson* (1982) 75 Cr App R 24 and held that it had no power to inquire into the circumstances in which the applicant was brought within the jurisdiction.

In the present case the Divisional Court approved the decision in *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95 and in giving the leading judgment of the court Woolf LJ said ([1993] 2 All ER 474 at 479):

> 'However, quite apart from authority, I am bound to say it seems to me that the approach of Stephen Brown LJ [in *Ex p Driver*], in general, must be correct. The power which the court is exercising, and the power which the court was purporting to exercise, in *Ex p Mackeson* is one which is based upon the inherent power of the court to protect itself against the abuse of its own process. If the matters which are being relied upon have nothing to do with that process but only explain how a person comes to be within the jurisdiction so that that process can commence, it seems to me difficult to see how the process of the *court* (and I emphasise the word "court") can be

abused by the fact that a person may or may not have been brought to this country improperly.' a

However, in a later passage Woolf LJ drew a distinction between improper behaviour by the police and the prosecution itself. He said ([1993] 2 All ER 474 at 479–480):

'Speaking for myself, I am not satisfied there could not be some form of residual discretion which in limited circumstances would enable a court to intervene, not on the basis of an abuse of process but on some other basis which in the appropriate circumstances could avail a person in a situation where he contends that the prosecution are involved in improper conduct.' b

Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of its submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair; but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process. In support of this submission your Lordships have been referred to *R v Sang* [1979] 2 All ER 1222 esp at 1230, 1245–1246, [1980] AC 402 esp at 436–437, 454–455 where Lord Diplock and Lord Scarman emphasise that the role of the judge is confined to the forensic process and that it is no part of the judge's function to exercise disciplinary powers over the police or the prosecution. c d e

The respondents have also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution: see in particular the majority opinion in *US v Alvarez-Machain* (1992) 112 S Ct 2188 reasserting the *Ker-Frisbie* rule (see *Ker v Illinois* (1886) 119 US 436 and *Frisbie v Collins* (1952) 342 US 519). I do not, however, find these decisions particularly helpful because they deal with the issue of whether or not an accused acquires a constitutional defence to the *jurisdiction* of the United States courts and not to the question whether, assuming the court has jurisdiction, it has a discretion to refuse to try the accused (see *Ker v Illinois* 119 US 436 at 444). f g

The respondents also cited two Canadian cases decided at the turn of the century, *R v Whiteside* (1904) 8 CCC 478 and *R v Walton* (1905) 10 CCC 269 which show that the Canadian courts followed the English and American courts accepting jurisdiction in criminal cases regardless of the circumstances in which the accused was brought within the jurisdiction of the Canadian court. We have also had our attention brought to the New Zealand decision in *Moevao v Dept of Labour* [1980] 1 NZLR 464, in which Richmond P expressed reservations about the correctness of his view that the prosecution in *R v Hartley* [1978] 2 NZLR 199 was an abuse of the process of the court and Woodhouse J reaffirmed his view to that effect. h j

The appellant contends for a wider interpretation of the court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J in *R v Hartley*, the powerful dissent of the minority in *US v Alvarez-Machain* (1992) 112 S Ct 2188 and the decision of the South African Court of Appeal in *S v Ebrahim* 1991 (2) SA 553, the headnote of which reads:

'The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the Court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued. The Court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial Court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The Court further held that the above rules embodied several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders. It was accordingly held that the Court *a quo* had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the Court *a quo*, the consequences of the trial had to be undone and the appeal disposed of as one against conviction and sentence. Both the conviction and sentence were accordingly set aside.'

In answer to the respondent's reliance upon *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 the appellant points to s 78 of the Police and Criminal Evidence Act 1984, which enlarges a judge's discretion to exclude evidence obtained by unfair means.

As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *R v Crown Court at Derby, ex p Brooks* (1984) 80 Cr App R 164 at 168–169 Sir Roger Ormrod said:

'The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant

> has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable ... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution ...'

There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In *Chu Piu-wing v A-G* [1984] HKLR 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence. McMullin V-P said (at 417–418):

> 'there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'

And in a recent decision of the Divisional Court in *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129 the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to s 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that

in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354:

> 'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Sinclair v DPP* [1991] 2 All ER 366, [1991] 2 AC 64 and *Atkinson v US Government* [1969] 3 All ER 1317, [1971] AC 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court.

Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. Although doubts were expressed by Viscount Dilhorne as to the existence of such a power in *DPP v Humphrys* [1976] 2 All ER 497 at 510–511, [1977] AC 1 at 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467 Lord Parker CJ, hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the court, said:

> 'So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.'

Diplock LJ expressed his agreement with this view (see [1967] 2 All ER 100 at 105, [1967] 2 QB 459 at 470).

In *R v Canterbury and St Augustine's Justices, ex p Klisiak* [1981] 2 All ER 129 at 136, [1982] QB 398 at 411 Lord Lane CJ was prepared to assume such a jurisdiction. In *R v West London Stipendiary Magistrate, ex p Anderson* (1984) 80 Cr App R 143 at 149 Robert Goff LJ, reviewing the position at that date, said:

'There was at one time some doubt whether magistrates had jurisdiction to decline to allow a criminal prosecution to proceed on the ground that it amounted to an abuse of the process of the court: see D.P.P. *v.* HUMPHRYS ([1976] 2 All ER 497 at 504–505, [1977] AC 1 at 19) *per* Viscount Dilhorne. However, a line of authority which has developed since that case has clearly established that magistrates do indeed have such a jurisdiction: see in particular BRENTFORD JUSTICES, *Ex parte* WONG ([1981] 1 All ER 884 at 888, [1981] QB 445); WATFORD JUSTICES, *Ex parte* OUTRIM ([1983] RTR 26); GRAYS JUSTICES, *Ex parte* GRAHAM ([1982] 3 All ER 653, [1982] QB 1239). The power has, however, been described by the Lord Chief Justice as being "very strictly confined": see OXFORD CITY JUSTICES, *Ex parte* SMITH ((1982) 75 Cr App R 200 at 204).'

The power has recently and most comprehensively been considered and affirmed by the Divisional Court by *R v Telford Justices, ex p Badhan* [1991] 2 All ER 854 at 862, [1991] 2 QB 78 at 89.

Provided it is appreciated by magistrates that this is a power to be most sparingly exercised, of which they have received more than sufficient judicial warning (see, for example, Lord Lane CJ in *R v Oxford City Justices, ex p Smith* (1982) 75 Cr App R 200 and Ackner LJ in *R v Horsham Justices, ex p Reeves* (1980) 75 Cr App R 236), it appears to me to be a beneficial development and I am unpersuaded that there are any sufficient reasons to overrule a long line of authority developed by successive Lord Chief Justices and judges in the Divisional Court, who are daily in much closer touch with the work in the magistrates' court than your Lordships. Nor do I see any force in an argument developed by the respondents which sought to equate abuse of process with contempt of court. I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court, which I regard as the proper forum in which such a decision should be taken.

I would answer the certified question as follows. The High Court in the exercise of its supervisory jurisdiction has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures it may stay the prosecution and order the release of the accused.

Accordingly, I would allow this appeal and remit the case to the Divisional Court for further consideration.

LORD BRIDGE OF HARWICH. My Lords, this appeal raises an important question of principle. When a person is arrested and charged with a criminal offence, is it a valid ground of objection to the exercise of the court's jurisdiction

to try him that the prosecuting authority secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him from within the jurisdiction of some other state, in violation of international law, in violation of the laws of the state from which he was abducted, in violation of whatever rights he enjoyed under the laws of that state and in disregard of available procedures to secure his lawful extradition to this country from the state where he was residing? This is to state the issue very starkly, perhaps some may think tendentiously. But, because this appeal has to be determined on the basis of assumed facts, your Lordships, as it seems to me, cannot avoid grappling with the issue in this stark form.

In this country and in Scotland the mainstream of authority, as the careful review in the speech of my noble and learned friend Lord Griffiths shows, appears to give a negative answer to the question posed, holding that the courts have no power to examine the circumstances in which a prisoner was brought within the jurisdiction. I fully recognise the cogency of the arguments which can be adduced in support of this view, sustained as they are by the public interest in the prosecution and punishment of crime. But none of the previous authorities is binding on your Lordships' House and, if there is another important principle of law which ought to influence the answer to the question posed, then your Lordships are at liberty, indeed under a duty, to examine it and, if it transpires that this is an area where two valid principles of law come into conflict, it must, in my opinion, be for your Lordships to decide as a matter of principle which of the two conflicting principles of law ought to prevail.

When we look to see how other jurisdictions have answered a question analogous to that before the House in terms of their own legal systems, the most striking example of an affirmative answer is the decision of the South African Court of Appeal in *S v Ebrahim* 1991 (2) SA 553 allowing an appeal against his conviction for treason by a member of the African National Congress on the sole ground that he had been abducted from Swaziland, outside the jurisdiction of the South African court, by persons acting as agents of the South African state. This decision, as the summary in the headnote shows, resulted from the application of—

> 'several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the State was involved in the abduction of persons across the country's borders.'

In the United States, the authorities reveal a conflict of judicial opinion. The doctrine established by Supreme Court decisions in 1886 of *Ker v Illinois* 119 US 436 and in 1952 of *Frisbie v Collins* 342 US 519 accords substantially in its effect with the doctrine of the early English authorities. But more recently this doctrine has been powerfully challenged. In *US v Toscanino* (1974) 500 F 2d 267 at 268 the defendant, an Italian citizen, who had been convicted in the New York District Court of a drug conspiracy, alleged that the court had 'acquired jurisdiction over him unlawfully through the conduct of American agents who kidnapped him in

Uruguay ... tortured him and abducted him to the United States for the purpose of prosecuting him' there. The lower court having held that these allegations were immaterial to the exercise of its jurisdiction to try him, provided he was physically present at the time of trial, he appealed to the United States Court of Appeals for the Second Circuit. The effect of the court's decision is sufficiently summarised in the headnote. The court held:

> ' ... that federal district court's criminal process would be abused or degraded if it was executed against defendant Italian citizen, who alleged that he was brought into the United States from Uruguay after being kidnapped, and such abuse could not be tolerated without debasing the processes of justice, so that defendant was entitled to a hearing on his allegations ... Government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, court's acquisition of power over his person represents the fruits of the Government's exploitation of its own misconduct.'

The most recent decision of the United States Supreme Court in *US v Alvarez-Machain* (1992) 112 S Ct 2188 concerned a Mexican citizen indicted for the murder of an agent of the Drug Enforcement Administration (the DEA). The district court had held that other DEA agents had been responsible for the defendant's abduction from Mexico, that this had been in violation of the extradition treaty between Mexico and the United States and that the accused should be discharged and repatriated to Mexico. This decision was affirmed by the United States Court of Appeals for the Ninth Circuit but reversed by the Supreme Court by a majority of 6 to 3. The opinions related primarily to the question whether the abduction was a breach of the treaty. The majority held that the abduction, although 'shocking', involved no breach of the treaty and relied on the earlier decisions in *Ker v Illinois* 119 US 436 and *Frisbie v Collins* 342 US 519 for the view that the abduction was irrelevant to the exercise of the court's criminal jurisdiction. The dissenting opinion of Stevens J, in which Blackmun and O'Connor JJ joined, held that the abduction was both in breach of the treaty and in violation of general principles of international law and distinguished the earlier authorities as having no application to a case where the abduction in violation of international law was carried out on the authority of the executive branch of the United States government. The minority opinion was that this was an infringement of the rule of law which it was the court's duty to uphold. After referring to the South African decision in *S v Ebrahim*, Stevens J writes in the final paragraph of his opinion (at 2206):

> 'The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the "monstrous" decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.'

In the common law jurisdiction closest to our own, the opinion expressed by Woodhouse J in the New Zealand case of *R v Hartley* [1978] 2 NZLR 199, in which he describes the issue as 'basic to the whole concept of freedom in society', has already been cited by my noble and learned friend Lord Griffiths and I need not repeat it. In the later case of *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 475–476 Woodhouse J cited the relevant passage from his own judgment in *R v Hartley* and added:

'It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process. And in this regard the Courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the *Connelly* case [*Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1353] Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the Courts accepting what he described as their "inescapable duty to secure fair treatment for those who come or are brought before them". He said that "the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused" ... Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is "the process of law", to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the Court system. It is the function and purpose of the Courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase "abuse of process" by itself does not give sufficient emphasis to the principle that in this context the Court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general. It is for reasons of this kind that I remain of the opinion that the trial Judge would have been entirely justified in the *Hartley* case in stopping the prosecution against the man Bennett.'

Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse J in *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 476, as an 'abuse of the criminal jurisdiction

in general' or indeed, in the language of Mansfield J in *US v Toscanino* (1974) 500 F 2d 267 at 276, as a 'degradation' of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one.

For these reasons and for the reasons given in the speech of my noble and learned friend Lord Griffiths, with which I fully agree, I would allow the appeal.

LORD OLIVER OF AYLMERTON. My Lords, a citizen whose rights have been infringed by unlawful or overenthusiastic action on the part of an executive functionary has a remedy by way of recourse to the courts in civil proceedings. It may not be an ideal remedy. It may not always be a remedy which is easily available to the person injured. It may not even, certainly in his estimation, be an adequate remedy. But it is the remedy which the law provides to the citizen who chooses to invoke it. The question raised by this appeal is whether, in addition to such remedies as may be available in civil proceedings, the court should assume the duty of overseeing, controlling and punishing an abuse of executive power leading up to properly instituted criminal proceedings not by means of the conventional remedies invoked at the instance of the person claiming to have been injured by such abuse but by restraining the further prosecution of those proceedings. The results of the assumption of such a jurisdiction are threefold; and they are surprising. First, the trial put in train by a charge which has been properly laid will not take place and the person charged (if guilty) will escape a just punishment; secondly, the civil remedies available to that person will remain enforceable; and, thirdly, the public interest in the prosecution and punishment of crime will have been defeated not by a necessary process of penalising those responsible for executive abuse but simply for the purpose of manifesting judicial disapproval.

It is, of course, axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all. But it is also axiomatic that there is a strong public interest in the prosecution and punishment of crime. Absent any suggestion of unfairness or oppression in the trial process, an application to the court charged with the trial of a criminal offence (to which it may be convenient to refer by the shorthand expression 'a criminal court'), whether that application be made at the trial or at earlier committal proceedings, to order the discontinuance of the prosecution and the discharge of the accused on the ground of some anterior executive activity in which the court is in no way implicated requires to be justified by some very cogent reason.

Making, as I do, every assumption in favour of the appellant as regards the veracity of the evidence which he has adduced and the implications sought to be drawn from it, I discern no such cogent reason in the instant case. I do not consider that, either as a matter of established law or as a matter of principle, a criminal court should be concerned to entertain questions as to the propriety of anterior executive acts of the law enforcement agencies which have no bearing upon the fairness or propriety of the trial process or the ability of the accused to defend himself against charges properly brought against him.

I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Griffiths and I gratefully acknowledge and adopt his recitation of the relevant authorities and the conflict of judicial opinion which arises from them. Your Lordships have, in addition, been referred in the course of argument to a number of reports of civil cases of respectable antiquity in which

persons originally *unlawfully detained have been* released from custody in the exercise of the court's undoubted jurisdiction to prevent abuses of its own process. But those were cases in which parties to civil proceedings had sought to take advantage of their own wrong in securing the unlawful detention of another party by serving proceedings for civil arrest upon him whilst unlawfully detained. In the case of a person charged with the commission of a criminal offence following an allegedly irregular initial detention, there was, until *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24, an unbroken line of authority in the United Kingdom dating from the early nineteenth century for the proposition perhaps most pithily expressed by Lord Goddard CJ in *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373 that once a person is in lawful custody in this country the court has no power and is not concerned to inquire into the circumstances in which he may have been brought here. *Ex p Mackeson* and *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108, which impliedly followed it, were to the contrary effect, but in a reserved judgment of the Divisional Court delivered by Stephen Brown LJ in *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95, in which all the relevant authorities were fully reviewed, that court followed the earlier line of authority and rejected the decision in *Ex p Mackeson* as having been decided per incuriam. *Ex p Driver* was followed by the Divisional Court in the instant case in rejecting the appellant's claim that the criminal court had jurisdiction to consider and pass judgment upon the circumstances in which he had been brought within the jurisdiction.

The appellant invites this House now to say that the decision in *Ex p Mackeson* is to be preferred and that a criminal court's undoubted jurisdiction to prevent abuses of its own process should be extended, if indeed it does not already extend, to embrace a much wider jurisdiction to oversee what is referred to generally as 'the administration of justice', in the broadest sense of the term, including the executive acts of law enforcement agencies occurring before the process of the court has been invoked at all and having no bearing whatever upon the fairness of the trial.

I have to say that I am firmly of the opinion that, whether such a course be properly described as legislation or merely as pushing forward the frontiers of the common law, the invitation is one which ought to be resisted. For my part, I see neither any inexorable logic calling for such an extension nor any social need for it, and it seems to me to be a course which will be productive of a good deal of inconvenience and uncertainty.

I can, perhaps, best explain my reluctance to embark upon such a course by postulating and seeking to answer two questions. First, does a criminal court have, or should it have, any *general* duty or any power to investigate and oversee executive abuses on the part of law-enforcement officers not affecting either the fairness of the trial process or the bona fides of the charge which it is called upon to try and occurring prior to the institution of the criminal proceedings and to order the discontinuance of such proceedings and the discharge of the accused if it is satisfied that such abuses have taken place? Secondly, if there is no such general jurisdiction and if the executive abuse alleged consists of the repatriation of the accused from a foreign country through acts which are unlawful in the country in which they occurred, is there some special quality in this form of executive abuse which gives rise to or which calls for the creation of such a jurisdiction in this particular case?

So far as the first question is concerned, I know of no authority for the existence of any such general supervisory jurisdiction in a criminal court. It is

not, of course, in dispute that the court has power to prevent the abuse of its own process and that must, I would accept, include power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively—for instance if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place. Thus, I would not for a moment wish to suggest any doubt as to the correctness of a decision such as that in the recent case of *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129, where the court quashed committal proceedings instituted after an undertaking given to the accused by police officers that he would not be prosecuted. In such a case doubt is cast both upon the bona fides of the prosecution and on the fairness of the process to an accused who has been invited to prejudice his own position on the faith of the undertaking. Where, however, there is no suggestion that the charge is other than bona fide or that there is any unfairness in the trial process, the duty of the criminal court is simply to try the case and I can see no ground upon which it can claim a discretion, or upon which it ought properly to be invited, to discontinue the proceedings and discharge an accused who is properly charged simply because of some alleged anterior excess or unlawful act on the part of the executive officers concerned with his apprehension and detention. That is not for a moment to suggest that such abuses, if they occur, are unimportant or are to be lightly accepted; but they are acts for which, if they are unlawful, the accused has the same remedies as those available to any other citizen whose legal rights have been infringed. If they are not only unlawful but are criminal as well, they are themselves remediable by criminal prosecution. That a judge may disapprove of or even be rightly outraged by the manner in which an accused has been apprehended or by his treatment whilst in custody cannot, however, provide a ground for declining to perform the public duty of insuring that, once properly charged, he is tried fairly according to law.

In *R v Sang* [1979] 2 All ER 1222 at 1245, [1980] AC 402 at 454 Lord Scarman observed:

> 'Judges are not responsible for the bringing or abandonment of prosecutions; nor have they the right to adjudicate in a way which indirectly usurps the functions of the legislature or jury.'

Those words were used in the context of a suggested discretion to prevent a prosecution because of judicial disapproval of the way in which admissible evidence had been obtained, but they are equally applicable to other executive acts which may incur judicial disapprobation. Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. They may take the form of allegations of illegal entry on private premises, of damage to property, of the use of excessive force or even of ill-treatment or violence whilst in custody. So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused, having no bearing upon the fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of executive power entitles the accused to be exonerated. But then at what point and at what

degree of outrage is the criminal court to undertake an inquiry and, if satisfied, to take upon itself the responsibility of refusing further to try the case?

If, then, it be right, as I believe that it is, that there neither is nor should be any general discretion in a criminal court to inquire into the conduct of executive officers before and leading up to the institution of criminal proceedings, the second question which I have ventured to postulate arises. Where, with the connivance or at the instigation of executive officers in this country, an accused person who has taken refuge in a foreign country is brought as a result of activity unlawful in that country within the jurisdiction of an English court and is then lawfully detained and charged, is there some special quality attaching to the unlawful and abusive activity abroad which confers or ought to confer on the criminal court a discretion which it would not otherwise possess?

The matter can, perhaps, best be illustrated by a hypothetical example of two terrorists, A and B, who, having detonated a bomb in London, make their way to Dover with a view to escaping abroad. A, as a result of a quarrel with a ticket inspector, is wrongfully detained by the railway police and whilst still in wrongful custody is duly arrested for the terrorist offence and subsequently charged. B, having successfully boarded a Channel ferry, is recognised as he steps ashore in Calais by two off-duty constables returning from holiday who seize him on the quayside and take him back on board keeping him under restraint until the ferry returns to Dover where he is arrested and charged. Now nobody would, I think, suggest for a moment that the trial of A should not proceed, simply because, as a result of a wrongful arrest and detention, he has been prevented from making good his escape, although he has in fact been put in the position of being charged and brought to trial only by reason of an unlawful abuse of executive power. What, then, distinguishes the case of B and confers on the criminal court in his case a discretion to stay his trial and discharge him which the court which does not possess in the case of A? I can see only two possible justifications for the suggestion that the court ought, in B's case, to have such a discretion. First, it may be argued that, as a matter of international comity, an English court ought to signify its disapproval of the invasion of the protective rights of a foreign state over those who come within its jurisdiction by declining to try a person who has been wrongfully removed from the protection of that state through the instrumentality of persons for whose actions the authorities of this country are responsible. I do not find this argument persuasive. An English criminal court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state is, as it seems to me, a matter which can only properly be pursued on a diplomatic level between the government of the United Kingdom and the government of that state.

Secondly, it may be argued that the unlawful activity of which complaint is made, because it results in the accused being brought within a jurisdiction from which he would otherwise have escaped, is invested with a special character because it infringes some 'right' of the accused in English law to be repatriated only through a process of extradition by the state under whose protection he has succeeded in placing himself. Now it is, of course, perfectly true that the Extradition Act 1989 contains, in s 6(4), an inhibition upon extradition from the United Kingdom unless provision is made by the receiving state that the person extradited will not, without the consent of the Secretary of State, be dealt with for (in broad terms) offences other than those in respect of which his extradition has been ordered. That provision is mirrored in s 18 of the Act, which provides that the person extradited to the United Kingdom from a foreign state will not be

triable for (again in board terms) offences other than those for which he has been extradited unless he has first had an opportunity of leaving the United Kingdom. Thus a person who is returned only as a result of extradition proceedings enjoys, as a result of this statutory inhibition, an advantage over one who elects to return voluntarily or who is otherwise induced to return within the jurisdiction. But these are provisions inserted in the Act for the purpose of giving effect to reciprocal treaty arrangements for extradition. I cannot, for my part, regard them as conferring upon a person who is fortunate enough successfully to flee the jurisdiction some 'right' in English law which is invaded if he is brought or induced to come back within the jurisdiction otherwise than by an extradition process, much less a right the invasion of which a criminal court is entitled or bound to treat as vitiating the process commenced by a charge properly brought. It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad—for instance in securing the deportation of the accused without proper authority—in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage in which the accused might have derived from the extradition process is likewise destroyed. No 'right' of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

I would only add that if, contrary to my opinion, such an extended jurisdiction over executive abuse does exist, I entirely concur with what has fallen from my noble and learned friend Lord Griffiths with regard to the appropriate court to exercise such jurisdiction. I would dismiss the appeal and answer the certified question in the negative.

LORD LOWRY. My Lords, having had the advantage of reading in draft the speeches of your Lordships, I accept the conclusion of my noble and learned friends Lord Griffiths and Lord Bridge of Harwich that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities. Recognising, however, the clear and forceful reasoning of my noble and learned friend Lord Oliver of Aylmerton to the contrary, I venture to contribute some observations of my own.

The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. *Archbold's Pleading Evidence and Practice in Criminal Cases* (44th edn, 1992) p 430, para 4.44 calls it 'a misuse or improper manipulation of the process of the court'. In *Rourke v R* [1978] 1 SCR 1021 at 1038 Laskin CJC said: '[The court] is entitled to protect its process from abuse' and also referred to 'the danger of generalizing the application of the doctrine of abuse of process' (at 1041). In *Moevao v Dept of*

Labour [1980] 1 NZLR 464 at 476 Woodhouse J spoke approvingly of 'the much wider and more serious abuse of the criminal jurisdiction in general', whereas Richmond P (at 471), giving expression to reservations about the view in which he had concurred in *R v Hartley* [1978] 2 NZLR 199, referred to the need to establish 'that the process of the Court is itself being wrongly made use of'. I think that the words used by Woodhouse J involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by Richmond P. The question still remains: what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds?

Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *R v Grays Justices, ex p Low* [1988] 3 All ER 834, [1990] 1 QB 54 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *R v Horsham Justices, ex p Reeves* (1980) 75 Cr App R 236 it was held to be an abuse of process to pursue charges when the magistrates had already found 'no case to answer'. It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the ground of abuse of process.

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely 'pour encourager les autres'.

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The court in *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24, while quite clear that there was jurisdiction to try the applicant, relied on *R v Hartley* [1978] 2 NZLR 199 for the existence of a discretion to make an order of prohibition. Woodhouse J in *R v Hartley* (at 217) had also recognised the *jurisdiction* to try the accused Bennett, but expressed the court's conclusion that to do so in the circumstances offended against 'one of the most important principles of the rule of law'. The court's decision in *R v Plymouth Magistrates'*

Court, ex p Driver [1985] 2 All ER 681, [1986] QB 95 to the contrary effect was influenced by *Ex p Scott* (1829) 9 B & C 446, 109 ER 166, *Sinclair v HM Advocate* (1890) 17 R (J) 38 and *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373. *Ex p Scott* and *Sinclair v HM Advocate* were decisions on jurisdiction and formed the basis of the decision in *Ex p Elliott*, in which there was an application for a writ of habeas corpus, based on the allegation that the applicant was not subject to military law and that he was wrongfully held in custody. My noble and learned friend Lord Griffiths has described the argument advanced by the applicant and the manner in which Lord Goddard CJ dealt with that argument in the court's judgment by reference to *Ex p Scott* and *Sinclair v HM Advocate*. Then, having disposed of an argument based on provisions of the Army Act ... relating to arrest, Lord Goddard CJ came to 'The only point in which there was any substance ... whether there has been such delay that this court ought to interfere' (see [1949] 1 All ER 373 at 379). Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it (at 379):

> 'What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him.'

This brief review strengthens my inclination to prefer *Ex p Mackeson* to *Ex p Driver* and to the Divisional Court's judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *R v Hartley*. My noble and learned friend Lord Griffiths has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of *jurisdiction* and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondents: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process ('the fruit of the poisoned tree'), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore a fortiori the view in this jurisdiction ought to favour trying such accused persons, having regard to the more tolerant common law attitude here to unlawfully obtained evidence, as shown by *R v Sang* [1979] 2 All ER 1222, [1980] AC 402. My answer is that I would consider it a dangerous and question-begging process to rely on this chain of reasoning, particularly where the constitutional meaning of 'due process' is one of the factors. As your Lordships have noted, the respondents also relied on *R v Sang* directly in order to support the argument that it does not matter whether the accused comes to be within the jurisdiction by fair means or foul.

The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its

inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial.

The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law. For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading CJ in a different context in *R v Lee Kun* [1916] 1 KB 337 at 341, [1914-15] All ER Rep 603 at 605:

> '... the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State.'

If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety.

I regard it as essential to the rule of law that the court should not have to make available its process and thereby indorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty, the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting. Nor do I consider that your Lordships ought to be deterred from deciding in favour of discretion by the difficulty, which may sometimes arise, of proving the necessary facts.

I would now pose and try to answer three questions.

(1) What is the position if without intervention by the British authorities a 'wanted man' is wrongfully transported from a foreign country to this jurisdiction? The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved and the question of staying criminal proceedings, as proposed in a case like the present, does not arise. It seems to me, however, that in practice the transporting of a wanted man to the United

Kingdom from elsewhere (by whatever method) will nearly always take place in consequence of a request by the executive here.

(2) Why should the court not stay for abuse of process if the accused has been wrongfully arrested in the United Kingdom (which is not alleged to have happened in the instant case)? A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process.

(3) If at common law the rule in *R v Sang* applies to let in admissible evidence obtained by wrongful conduct on the part of the executive, why does similar reasoning not prevail where the presence of the accused has been procured by wrongful conduct in which the executive is involved? *R v Sang* exemplifies a common law rule of evidence, as explained by the speeches in that case, which applied to all admissible evidence except confessions and certain evidence produced by confessions (as to which see *Lam Chi-ming v R* [1991] 3 All ER 172, [1991] 2 AC 212). The abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the executive in an international context. Secondly, although there is no discretion at common law to exclude evidence (except confession evidence) by reason of wrongful conduct, there is discretion to stay proceedings as an abuse of process (see *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254) and the alleged facts of the instant case are but one example of the need for that discretion.

It has been suggested that, since the executive conduct complained of invades the rights of other countries and of persons under their protection and detracts from international comity, the remedy lies not with the courts but in the field of diplomacy. I would answer that the court must jealously protect its own process from misuse *by the executive* and that this necessity gives particular point to the observation of Lord Devlin (which my noble and learned friend Lord Griffiths has already noted) in *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354:

> 'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'

I now turn to the question of procedure. The appellant, having been committed for trial, applied for an order of certiorari to quash the order for committal on the ground that the magistrates refused to adjourn the committal proceedings 'to enable the point of abuse of process to be argued', presumably in the Divisional Court of the Queen's Bench Division. Although I feel obliged to consider the procedure which was followed in this case and that which must follow from the conclusion of the majority of your Lordships, I preface my remarks by saying that I agree with the answer to the certified question, and also with the order, which my noble and learned friend Lord Griffiths has proposed.

In *Ex p Mackeson* (1981) 75 Cr App R 24 the applicant applied to the Divisional Court before the day fixed for the committal proceedings for an order of certiorari quashing the charges against him and prohibiting the magistrates from proceeding with the committal proceedings. The Divisional Court, having held that there was jurisdiction to stay the proceedings as an abuse of process, granted prohibition. In *R v Guildford Magistrates' Court, ex p Healy* [1983] 1 WLR 108, another case of alleged 'disguised extradition', the single lay justice hearing the committal proceedings was invited to decide the abuse of process point and to stay the proceedings. After a five-day hearing she decided the point against the

accused, who then applied for an order of certiorari. I have difficulty in seeing how the magistrate's decision on a question of fact could have been attacked by certiorari but in any event the Divisional Court rejected the application on the merits. So the committal stood. In his judgment Griffiths LJ, as my noble and learned friend then was, said (at 111–112):

> 'This court considers that it was wrong to invite a single lay justice to consider a matter such as this. Whether or not there has been an abuse of process of the sort raised in these proceedings is a matter far more fitting to be inquired into by the Queen's Bench Divisional Court than by a single justice. If a point such as this is to be taken in future it should be taken in the form in which it was in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*; that is, there should be an objection to the justice hearing the committal and the matter should be pursued before the Divisional Court by way of an application for judicial review seeking an order of prohibition. That is not to say that we have any criticism whatsoever of the way in which the justice approached her task in this case. Both the defence and the prosecution asked her to decide the question; she clearly went into it with the greatest care and we are quite unable to find any fault or criticism with any of the conclusions of fact at which she arrived. In the opinion of this court, having been asked to undertake a task which we do not think was appropriate for a single lay justice, she discharged her duties quite admirably ... Accordingly, I have come to the conclusion that there is no merit or substance in this application and it will be refused. As I say, if this question is to be raised in further cases the proper procedure is to use that in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, so that the Divisional Court may be seised of the matter, and not bring it up before a lay justice on committal proceedings. However, we anticipate that cases of this nature are likely to be very rare.'

McCullough J, concurring, said (at 113):

> 'Whether this was an application properly made to the justice or whether it was one that should properly have been made in the first place to the Divisional Court, I am in no doubt that no order of certiorari should go. Despite the admirable way in which this justice dealt with the matter, I share the concern of Griffiths L.J. that a single lay justice should be asked to grapple with questions of this kind. It is better I think that the question should be dealt with as in *Reg. v. Bow Street Magistrates, Ex parte Mackeson*, even although such a course may leave one wondering precisely how a justice in such circumstances can be said to have acted in excess of jurisdiction or made an error of law.'

In *R v Plymouth Magistrates' Court, ex p Driver* [1985] 2 All ER 681, [1986] QB 95 the applicant sought prohibition in accordance with the *Mackeson* procedure, as recommended in *Ex p Healy*, but the order sought was refused on the ground that there was no jurisdiction to stay for the reasons relied on.

The *Driver* doctrine therefore held sway when the present case came before the magistrates with a view to committal. Accordingly, it is understandable that the magistrates rejected the request of the accused to adjourn while he made a *Mackeson* application and instead proceeded to commit him for trial.

My Lords, I am satisfied that, on the facts found in *Ex p Mackeson*, it was both lawful and appropriate to make an order of prohibition directed to the magistrates' court. While that court had *jurisdiction* to entertain committal proceedings, the High Court decided that to permit the criminal proceedings

against the accused to continue would be an abuse of process of the court (of trial); it would therefore be equally an abuse of process to permit proceedings in the magistrates' court to be conducted (or, once embarked on, continued) with a view to committing the accused to the Crown Court for trial, which would be oppressive to the accused and a waste of the court's time. A parallel is found in the order made in *R v Telford Justices, ex p Badhan* [1991] 2 All ER 854, [1991] 2 QB 78, where the Divisional Court prohibited the magistrates from further hearing committal proceedings on the ground that, by reason of the prejudice caused by delay, to proceed against the accused would amount to an abuse of process. In my view the fact that the decision and order are made by the High Court, although the Crown Court is the proposed court of trial, makes no difference. It is the function of the High Court to exercise supervisory jurisdiction over inferior courts, including the magistrates' court. It is, moreover noteworthy that the function of directing or giving consent to preferment of a 'voluntary' bill of indictment can only be performed by a *High Court judge* in England and Wales (or by the direction of the Criminal Division of the Court of Appeal): see the Administration of Justice (Miscellaneous Provisions) Act 1933, s 2(2), which continues in force unamended since the transfer of criminal jurisdiction on indictment to the Crown Court in 1971. What I have said is not of course intended to detract from the power of the court of trial itself, as the primary forum, to stay proceedings as an abuse of process, but the convenience of staying the proceedings at an earlier stage is obvious, when that can properly be done.

Short of allowing the proceedings to reach the Crown Court, the merit of having the case considered by the High Court in preference to the examining magistrate or magistrates is clear. In any event, notwithstanding dicta to the contrary, I would, on the authority of *Grassby v R* (1989) 168 CLR 1, a decision of the High Court of Australia, and of cases there cited (to which I shall presently refer), not be easily persuaded that *examining magistrates* have jurisdiction to stay committal proceedings for abuse of process. (I say nothing about the power of magistrates when sitting to try a case as a court of summary jurisdiction, as in *Mills v Cooper* [1967] 2 All ER 100, [1967] 2 QB 459.)

My Lords, as I have said, the remedy sought is an order of certiorari. I prefer to consider that remedy according to the conventional, perhaps now 'old-fashioned', principles enunciated in *R (Martin) v Mahony* [1910] 2 IR 695, *R v Nat Bell Liquors Ltd* [1922] 2 AC 128, [1922] All ER Rep 335 and *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122, [1952] 1 KB 338, without seeking to justify the making of an order in this case by reference to more recent views, including views based on dicta uttered in this House. As I see it, the magistrates here, understandably but erroneously relying on *Ex p Driver* [1985] 2 All ER 681, [1986] QB 95, acted prematurely and therefore without jurisdiction when they proceeded to hear and determine the committal proceedings without first allowing the appellant to make to the Divisional Court an application which (subject to *Ex p Driver*) was on its face at least worthy of consideration. Having, however innocently, neglected an essential preliminary step (namely the adjournment decreed by *Ex p Healy* [1983] 1 WLR 108), the magistrates incurred the liability to have their order of committal quashed. For an example of proceedings in which a condition precedent to jurisdiction was omitted I refer to *McC v Mullan* [1984] 3 All ER 908, [1985] AC 528. I would be in favour of remitting the case to the Divisional Court to reconsider it in the light of your Lordships' opinions, since one alternative would be to refuse an order of certiorari because an application to stay the proceedings can perfectly well be made to the court of trial, and the decision (relating to trial on indictment) would not, it seems, be

reviewable: *DPP v Crown Court at Manchester and Ashton* [1993] 2 All ER 663, [1993] 2 WLR 846. The other, and perhaps more convenient, course would be for the Divisional Court now to hear the application for a stay. If that were decided in favour of the appellant, the court could make an order of certiorari and such other order, if any, as might be needed to prevent the proceedings in the magistrates' court from going ahead. It seems to me that, by analogy with proceedings which are terminated by reason of irregular extradition procedures, the appellant, if he succeeds, would have to be given an opportunity to 'escape' but, subject to that, I can see nothing to prevent him from being properly pursued in the future, for example by ad hoc extradition under s 15.

Since the resolution of the point is not essential to your Lordships' decision of the appeal, I shall be brief in my discussion of whether the examining magistrates can stay committal proceedings as an abuse of process.

In *Grassby v R* (1989) 168 CLR 1 the accused was charged with criminal defamation and the examining magistrate stayed the committal proceedings on the ground of abuse of process. The Crown appealed to the Court of Criminal Appeal of New South Wales, which set aside the stay. The accused sought special leave to appeal from that decision. The High Court granted special leave but dismissed the appeal (which involved another point, namely the refusal of a member of the Court of Criminal Appeal to disqualify himself). Dawson J delivered the leading judgment, holding that a committing magistrate has no power to stay the proceedings as an abuse of process. All the other members of the court, presided over by Mason CJ, agreed except Deane J, who considered that, if the magistrate concluded (in the words of the Justices Act 1902 (NSW)) that 'a jury would not be likely to convict' because the *trial court* was likely to stay the proceedings for abuse of process, he should then discharge the accused. The judge, however, agreed in the result on the facts and his dissent was based only on his interpretation of s 41(6) of the Justices Act.

Dawson J said that the magistrate's power to stay for abuse of process 'has been denied upon the highest authority in the United Kingdom' (see 168 CLR 1 at 10). He referred to *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254 and continued:

> 'See also *Mills v. Cooper* ([1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467), per Lord Parker C.J. Whether such comments were correct in relation to inferior courts exercising ordinary judicial functions has been doubted (see *Reg. v. Humphrys* [1976] 2 All ER 497, [1977] AC 1), per Viscount Dilhorne, *per* Lord Salmon; to the contrary *Reg. v. West London Stipendiary Magistrate; Ex parte Anderson* ((1984) 80 Cr App R 143 at 149), but it is clear that they do not extend to a magistrate hearing committal proceedings. In *Atkinson v. Government of the United States of America* [1969] 3 All ER 1317 at 1321–1322, [1971] AC 197 at 231–232 Lord Reid (with whom Lords MacDermott and Guest agreed) said: "The question is whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other ground such as that committal would be oppressive or contrary to natural justice. The appellant argues that every court in England has power to refuse to allow a criminal case to proceed if it appears that justice so requires. 'The appellant argues that this was established, if it had been in doubt, by the decision of this House in *Connelly v. Director of Public Prosecutions* ... Whatever may be the proper interpretation of the speeches in *Connelly's* case with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried. And that proposition has

no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial." ' *a*

In *Sinclair v DPP* [1991] 2 All ER 366 at 375, [1991] 2 AC 64 at 78, another extradition case, Lord Ackner in his illuminating speech pointed out that Lord Reid's view of the magistrate's power to refuse to commit for trial by reason of abuse of process was obiter. None the less a view expressed by such a high authority commends respect, and Lord Reid was making his point as an integral link in his argument, to show that in extradition proceedings a magistrate has no such power. *b*

Dawson J observed that it has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of a judicial or ministerial function. Citing seven Australian cases, he continued (168 CLR 1 at 11–12): *c*

'The explanation is largely to be found in history. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders. Following the Statutes of Philip and Mary of 1554 and 1555 [1 & 2 Ph & M c 13, 2 & 3 Ph & M c 10], they were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury. The role of the justices was thus inquisitorial and of a purely administrative nature. It was the grand jury, not the justices, who determined whether the accused should stand trial. With the establishment of an organized police force in England in 1829, the role of the justices underwent change. The most significant factor in this change was in *The Indictable Offences Act* 1848 (U.K.) [11 & 12 Vict c 42], "Sir John Jervis' Act", which provided for witnesses appearing before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel.' *d* *e* *f*

After an interesting and valuable historical review the judge said (at 15–16):

'The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. A fortiori that must be the case when its functions are of an administrative character. In *Reg. v. Forbes; Ex parte Bevan*((1972) 127 CLR 1 at 7), Menzies J. pointed out that: " 'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'." ' *g* *h* *j*

Then, having emphasised the distinction between inherent jurisdiction and jurisdiction by implication, Dawson J observed (at 17–18):

> 'The fact that in the conduct of committal proceedings a magistrate is performing a ministerial or administrative function is, of course, no bar to the existence of implied powers, if such are necessary for the effective exercise of the powers which are expressly conferred upon him. The latter are now to be found in s. 41 of the *Justices Act*. But the scheme of that section, far from requiring the implication of a general power to stay proceedings, is such as to impose an obligation upon the magistrate to dispose of the information which brings the defendant before him by discharging the defendant as to it or by committing him for trial.'

Having referred to s 41 of the Justices Act, Dawson J then said (at 18):

> 'There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided. Nor is this surprising. True it is that a person committed for trial is exposed to trial in a way in which he would otherwise not be, but the ultimate determination whether he does in fact stand trial does not rest with the magistrate. The power to order a stay where there is an abuse of the process of the trial court is not to be found in the committing magistrate and the considerations which would guide the exercise of that power have little relevance to the function which the magistrate is required to perform.'

It would, of course, be convenient (as well as correct, in my view) if the examining magistrates *could not* stay for abuse of process, because judicial review of a decision to stay would be a most inadequate remedy if the real ground of review was simply that the magistrates had erred in their exercise of discretion. Moreover, their decision would not bind the court of trial if the Attorney General were to prefer a voluntary bill.

For the reasons already mentioned and also for the reasons given by my noble and learned friends I would allow the appeal.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Griffiths, Lord Bridge of Harwich and Lord Oliver of Aylmerton. Despite the powerful reasons adverted to by Lord Oliver of Aylmerton I agree with Lord Griffiths that the question should be answered in the way he proposes. It does not seem to me to be right in principle that, when a person is brought within the jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, the court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality to refuse to proceed to trial. I would accordingly allow the appeal.

Appeal allowed. Case remitted to Divisional Court for further consideration.

Celia Fox Barrister.

Regina v Horseferry Road Magistrates' Court, Ex parte Bennett (No 2)

Before Lord Justice Mann and Mr Justice French

[Judgment March 10]

Propriety of procedure in regard to the liberty of any who were brought before the courts transcended the prosecution's understandable desire to bring a defendant to trial.

The Queen's Bench Divisional Court so held when allowing the application of Paul James Bennett for judicial review and quashing (i) committal charges preferred against him by the Crown Prosecution Service and (ii) the order of Horseferry Road Magistrates' Court committing him for trial, on the ground, *inter alia*, that he had been brought into the United Kingdom by unlawful means.

The application was dismissed by the Divisional Court (*The Times* September 1, 1992; [1992] TLR 430) but a question was certified for the House of Lords which allowed his appeal (*The Times* June 25, 1993; [1993] TLR 353; [1994] AC 42) and remitted the case to the Divisional Court for further consideration.

Mr Alan Newman, QC and Mr Brian Jubb for the applicant; Mr Colin Nicholls, QC and Mr Robert Fischel for the Crown.

LORD JUSTICE MANN said that Mr Bennett, a citizen of New Zealand, was wanted in the United Kingdom for alleged offences concerning deception in connection with the purchase of a helicopter.

He was arrested by Detective Sergeant Davies of the Metropolitan Police at Heathrow airport on February 22, 1991.

The essential question was how he came to be at Heathrow on that date. He had been in South Africa where the

authorities regarded him as an illegal immigrant. There was no extradition treaty between the UK and South Africa but there was the possibility of a special extradition arrangement under the Extradition Act 1989.

That was rejected seemingly for political reasons. Thus however he was at Heathrow, it was not through extradition procedures.

He came to be at Heathrow because the South African immigration authorities ostensibly decided that he should be repatriated to New Zealand through London.

The route was not an obvious one and involved a transfer between Heathrow and Gatwick. No arrangements had been made in regard to the transfer.

The only material enquiry, his Lordship said, was as to whether the applicant came to be in this country in defiance of extradition procedures in consequence of some collusion between the English police and the South African authorities.

The enquiry involved the liberty of the subject and the court had to be satisfied on a high balance of probabilities that the applicant was properly available for arrest at Heathrow.

On that question there was one decisive contemporary document, namely an internal CPS memorandum dated February 4, 1991, which read:

"DS Davies informs me that the S.A. police are, within the next few days, putting Bennett on a plane to N.Z. which rather conveniently will stop over at Heathrow! Special Branch have agreed to nick him and he will be taken to City Road for interview/charge . . ."

His Lordship regarded the exclamation mark as eloquent and concluded that when coupled with the curiosity of the route and the absence of inter-airport arrangements, that memorandum had to be regarded as decisive in the applicant's favour.

The desire to bring the applicant to trial was understandable but a propriety of procedure in regard to the liberty of any person who was brought within the jurisdiction of the English courts was transcendant.

Solicitors: Hallinan Blackburn Gittings & Nott; Crown Prosecution Service, Headquarters.